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#26018
#17755

No. 8588

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

CHARLES LUX ET AL.,

Appellants,

vs.

JAMES B. HAGGIN ET AL.,

Respondents.

TRANSCRIPT ON APPEAL.

Volume 1.

STETSON & HOUGHTON,
Attorneys for Appellants.

LOUIS T. HAGGIN,
Attorney for Respondents.

Filed Aug 22 *1882.*

F. M. Gross *Clerk,*

By B. Harlan *Deputy.*

JUDGMENT ROLL.

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In the Supreme Court

OF THE

1 *STATE OF CALIFORNIA.*

Transcript on Appeal.

CHARLES LUX AND AL.

2 v.

JAMES B. HAGGIN AND AL.

Complaint.

In the District Court of the Fourth Judicial District State of California, in and for the City and County of San Francisco.

3 Charles Lux,
John H. Redington,
Alfred A. Cohen,
Louis H. Bonestell,
F. A. Tracy,
Henry Miller,
James C. Crocker,
Horatio P. Livermore,
Horatio Stebbins,

Plaintiffs.

vs.

James B. Haggin,
Samuel H. Anderson,
R. J. Ashe,
James P. Attebery,
John M. Attebery,
Simeon Baker,
James Dixon,
R. L. Dixon,
Thomas A. Doe,
W. W. Drury,
Rosamond R. Emory,
W. W. Frazier,

Charles Beuterbaugh,
G. W. Bevis,
Hugh A. Blodget,
Emma C. Bludworth and
H. W. Bludworth, her husband,
William R. Bower, Administrator of Jesse Stark, deceased,
Clara C. Bowers,
Celsus Brower,
Charles F. Brown,
J. W. Burcham,
S. A. Burnap,
Reuben Butterfield,
C. B Caldwell,
William B. Carr,
Francis M. Carlock,
Bartolo Castro,
Tomas Castro,
Oliver T. Chubb,
J. A. Clarke,
Edward M. Crocker,
George W. Darden,
James McCaffrey,
Dallas McCord,
William P. McCord,
Randall Meacham,
Maggie S. Nelson and
F. D. Nelson, her husband,
Heman Noble,
Jesus Noriega,
Tomas Noriega,
Daniel Norton,
Peter O'Hara,
George K. Ober,
L. M. Owens,
Jerry Pensinger,
Charles J. Proft,
Philip Randall,
James J. Rhymes,
Hamilton D. Robb,
E. M. Roberts,
Fordyce Roper,
Allen E. Rose,
Isaac B. Rumford,
G. Schinn,
O. C. Shelly,
Zeno Gardner,
John W. Garlick,
William Goode,
John F. Gordon,
J. S. Henley,
S. B. Henley,
Seth H. Hickox,
Charles V. Hill,
Hiram Hill,
Eugene F. Hodgden,
Simon J. Hodges,
John G. Jackson,
Henry A. Jastro,
Philo D. Jewett,
Solomon Jewett,
Stowell M. Judd,
Michael Kearney,
Peter P. Kiefer,
J. M. Lundy,
Charles A. Maul,
Frank P. May,
R. C. May,
E. J. Shultz,
Parmelia E. Stark,
Isaac D. Stockton,
Van Doran Stoner,
George F. Thornton,
Eliza Tibbet,
Eliza Tibbet, executrix of Edward Tibbet, dec'd,
Daniel Troy,
A. W. Tuckey,
Christopher C. Webb,
Henry Wolff,
Simon W. Wyble,
A. York,
B. York,
C. York,
D. York,
E. York,
F. York,
G. York.
H. York,
I. York,
J. York,
K. York,
L. York,

8 The Kern River Water and Irrigating Company,
The Kern Island Irrigating Canal Company,
The Kern River Land and Canal Company,
The Stine Canal Company,
The Anderson Canal Company,
The Gates Canal Company,
The Buena Vista Canal Company,
The James Canal Company,
The Plunkett Canal Company,
The Meacham Irrigating Canal Company,
The Parish and Wilson Ditch Incorporation,
The Goose Lake Canal Company,
9 The Pioneer Canal Company,
The James and Dixon Canal Company,
The Joyce Canal Company,
The Kern Valley Bank,

Defendants.

Charles Lux, Henry Miller, John H. Redington, James C. Crocker, Alfred A. Cohen, Horatio P. Livermore, Louis H. Bonestell, Horatio Stebbins and F. A. Tracy, the plaintiffs above named, complain of the above named defendants, and for cause of action allege as follows:

10 That plaintiffs are ignorant of the names of the twelve (12) defendants sued herein by the surname of York, and therefore designate them respectively by the fictitious names of A., B., C., D., E., F., G., H., I., J., K. and L. York. and pray that when their true names are discovered, this complaint may be amended accordingly.

That plaintiffs are informed, and believe and therefore aver, that the following named defendants are each of them corporations, created, organized, and existing under and by virtue of the laws of the State
11 of California, to wit:

The Kern River Water and Irrigating Company,
The Kern Island Irrigating Canal Company,
The Kern River Land and Canal Company,
The Stine Canal Company,
The Anderson Canal Company,
The Gates Canal Company,
The Buena Vista Canal Company,
The James Canal Company,
The Plunkett Canal Company,
The Meacham Irrigating Canal Company,
The Parish and Wilson Ditch Incorporation,

The Goose Lake Canal Company,
The Pioneer Canal Company,
The James and Dixon Canal Company,
The Joyce Canal Company,
The Kern Valley Bank.

That heretofore, to wit: on or about the
day of Jesse Stark died intestate, in the
County of Kern, in the State of California, being at
the time of his death a resident of said County, and
leaving estate therein, and that afterwards such pro-
ceedings were had that Letters of Administration on
his estate were duly issued to defendant William R.
Bower, who thereupon became, ever since has been,
and now is, said Stark's Administrator.

That plaintiffs are informed and believe, and there-
fore aver, that heretofore, to wit, on or about the 30th
day of April, A.D. 1879, Edward Tibbet died testate, in
the said County of Kern, being at the time of his death
a resident thereof, and leaving estate therein; and by
his will appointed defendant Eliza Tibbet his exec-
utrix.

That plaintiffs are informed and believe and there-
fore aver, that they are severally the owners in fee,
seized and possessed of all those certain lands situated
in said County of Kern, and particularly described
according to the United States Surveys in certain
schedules, marked respectively, Schedule A, Schedule
B, Schedule C, Schedule D, Schedule E, Schedule F,
Schedule G, and Schedule H, which are hereunto an-
nexed and made a part of this complaint. And that
said lands are owned by the plaintiffs in the following
manner, that is to say:

The lands described in said Schedule A, by plaintiffs,
Lux, Miller and Crocker as tenants in common; the
lands described in said Schedule B, by plaintiffs, Red-
ington and Cohen as tenants in common; the lands
described in said Schedule C, by plaintiff Redington;
the lands described in said Schedule D, by plaintiff
Livermore; the lands described in said Schedule E, by
plaintiff Bonestell; the lands described in said Sche-
dule F, by plaintiff Stebbins; the lands described in
said Schedule G, by plaintiff Tracy.

And that plaintiffs, their predecessors and grantors,
have been the owners, seized and possessed of said
lands as aforesaid for more than eight years, continu-
ously, next preceding the commencement of this ac-
tion, and have been during all that time in the actual,

16 continuous, and exclusive possession thereof, holding the same under claim of title, exclusive of other right, founding such claim upon a written instrument or instruments, as being a conveyance or conveyances of the said lands; and holding said lands adversely to all the world.

That the said lands are situated along and bordering on a natural water-course known as "Buena Vista Slough," (which is the lower portion of the stream higher up called the Kern River), and along and bordering on Buena Vista Lake and Kern Lake, and the natural channel connecting them.

17 That the said Kern River is a natural stream or water-course, rising in the Sierra Nevada, and debouching from the mountains into the plains about ten miles easterly from the town of Bakersfield in said Kern County, whence it flows naturally to and through said Buena Vista Slough northward into Tulare Lake, and forms with the said Buena Vista Slough, one and the same stream; and that such has been the course of the said River for more than eleven years last past.

That plaintiffs are informed and believe, and therefore aver, that said Kern Lake and Buena Vista Lake are supplied with water almost entirely from Kern
18 River.

That plaintiffs are informed and believe, and therefore aver, that from the mountains down to a point in Township 29 South, Range 28 East, Mount Diablo Base and Meridian, (according to the United States Surveys), the said Kern River has always within the memory of man flowed in the same channel; but that after reaching said point the course of the river was anciently and down to the year 1862, along a channel known as the South Fork, which diverges from the present stream to the left, or southerly, and through which the
19 waters of the river then used to flow.

That plaintiffs are informed and believe, and therefore aver, that in the year 1862 a flood partially closed the said South Fork at the point aforesaid, and at the same time and suddenly opened a new channel, which coincided with the present channel of the river for about four (4) miles below the point aforesaid, and then turned off to the left, and followed the course of the slough now known as "Old River," and the greater part of the water which had anciently flowed in the South Fork was thus diverted therefrom, and Old River became, and until the winter of 1867 and 1868, continued to be the main channel of the Kern River.

20 That plaintiffs are informed and believe, and therefore aver, that in the winter of 1867 and 1868, another flood closed up the South Fork, and opened the present channel of the river, which channel so opened is now sometimes known as "New River."

That plaintiffs are informed and believe, and therefore aver, that the waters of the said Kern River naturally flow, and from time immemorial have flowed, and do naturally flow along, by, through, over, and upon plaintiffs' said lands, thereby irrigating them and making them fit for cultivation and pasture, besides supplying water thereon for stock and for agri-
21 cultural and domestic purposes, and for all other purposes for which an owner of lands bordering on a running stream has a right to use the waters thereof; and from time immemorial the said waters have done so, and would do so now, were it not for the diversion and appropriation and consumption of them by the defendants as hereinafter set forth.

That plaintiffs are informed and believe, and therefore aver, that for some time past defendant, the Kern Island Irrigating Canal Company, has been taking out from the said Kern River, at a point near where the South Fork diverges, as aforesaid, a portion of the water
22 of the Kern River, and diverting and appropriating the same for the purpose of irrigating certain lands to to the northward of Kern Lake, thereby consuming a part of the water which would naturally flow along, by, through, over, and upon plaintiffs said lands; and that said Kern Island Irrigating Canal Company still clams the right so to divert and appropriate said water, and is still doing so.

That for some time past, defendants,

Emma C. Bludworth, and	Henry A. Jastro,
H. W. Bludworth, her hus-	Philo D. Jewett,
23 band,	Solomon Jewett,
William R. Bower, Admin-	Kern Valley Bank.
istrator of Jesse Stark,	Heman Noble,
deceased.	L. M. Owens,
John W. Garlick,	Allen E. Rose,
James B. Haggin.	Daniel Troy,

and Christopher C. Webb,

(who are members of an association called the South Fork Ditch Company), have been, and still are taking out from the said Kern River, through the channel of the South Fork aforesaid, a portion of the water of the Kern River, and diverting and appropriating the same

for the purpose of irrigating certain lands along or near said South Fork, thereby consuming a part of the water which would naturally flow along, by, through over, and upon plaintiffs' said lands.

That plaintiffs are informed and believe, and therefore aver, that the remainder of the water of the Kern River, (that is to say: what remains after the diversion by the Kern Island Irrigating Canal Company, and the South Fork Ditch Company as aforesaid), would be enough to irrigate and make fit for cultivation and pasture plaintiffs' said lands, and cause the same to produce large and valuable crops, (besides supplying water thereon enough for all other lawful uses) were it not for the diversion and appropriation of the water by the other defendants, as hereinafter set forth.

That plaintiffs are informed and believe, and therefore aver, that for some time past the other defendants (that is to say all of them, except the Kern Island Irrigating Canal Company, and those above referred to as members of the "South Fork Ditch Company"), have been and still are taking out the waters of Kern River at various points after it leaves the mountains and above plaintiffs' said lands, and diverting the same by means of various canals and ditches for the purpose of irrigating certain lands which lie to the northward and eastward of Buena Vista Lake, and on both sides of the river, thereby consuming a large part, and at times all of the water which remains after the diversion by the Kern Island Irrigating Canal Company and the South Fork Ditch Company, as aforesaid, and which would naturally flow along, by, through, over, and upon plaintiffs said lands.

That all such taking out and diversion, use, appropriation and consumption of the water by the defendants as aforesaid, is to the prejudice of the riparian rights of the plaintiffs as owners of the lands aforesaid, and wrongful and unlawful (as regards plaintiffs and each of them), except that some of the defendants may be entitled by prescription, or as riparian owners, to a part of the water which they have been and are respectively diverting, appropriating, or using.

That the ditches and canals by which the waters of the Kern River are taken out and diverted as aforesaid, all take their water from the Kern River at points below the mountains and above plaintiffs' said lands, and the following are the names thereof, so far as known to plaintiffs, to wit:

28 The Beardsley Ditch,
The Kern Island Irrigating Canal,
The Old South Fork, or Panama Ditch,
The McCord Ditch,
The Reynolds Ditch,
The S. H. Anderson Ditch,
The Farmers' Ditch,
The Calloway Canal,
The Goode and McCaffrey Ditch,
29 The Castro Ditch,
The Stine Ditch,
Old River,
The Anderson Ditch,
The Gates Ditch,
The Buena Vista Ditch,
The James Ditch,
The Plunkett Ditch,
The Emory Ditch,
The Jones and Tuckey Ditch,
The Meacham Ditch,
The Wilson Ditch,
The Dixon Canal,
The Wyble Canal,
The Goose Lake Ditch,
The Pioneer Ditch,
The Edwards Ditch,
The James and Dixon Ditch,
The Johnson Ditch,
The Ashe Ditch,
The Henley Ditch,
The Frazier, or Rhymes Ditch,
The R. Butterfield Ditch,
The May Ditch,
The Joyce Ditch.

That plaintiffs are informed and believe, and therefore aver, that the lands, to irrigate which defendants have diverted and are diverting the water, as aforesaid,
30 are not, and never have been within the memory of man, naturally irrigated at all by any of the water of the Kern River, or otherwise, except certain lands along Panama Slough, and certain swamp and overflowed lands in the following named Townships, described according to the United States Surveys, and referred to the Mount Diablo Base and Meridian; that is to say:

Township Twenty-nine (29) South, Range Twenty-seven (27) East.

Township Twenty-nine (29) South, Range Twenty-
31 eight (28) East.

Township Thirty (30) South, Range Twenty-eight (28) East.

Township Thirty-one (31) South, Range Twenty-eight (28) East.

Township Thirty-two (32) South, Range Twenty-eight (28) East.

That plaintiffs are informed and believe, and therefore aver, that by reason of such taking out and diversion of the waters of the Kern River by the defendants, no water has run through or into the said Buena Vista Slough, nor into either Kern Lake or Buena

32 Vista Lake, nor through, by, over, or upon plaintiffs' said lands, since July, 1878, or thereabouts; and the said Buena Vista Slough is now dry, and Kern Lake and Buena Vista Lake very low, so that the water of the Kern River, instead of irrigating and moistening plaintiffs' said lands, and supplying water thereon for general uses, as it would naturally do, entirely fails to do so, and plaintiffs' said lands are now, and ever since July, 1878, or thereabouts, have been deprived of their natural moisture.

That owing to the nature of the climate and the country, and the slight rainfall where plaintiffs' said
33 lands are situated, the same, unless irrigated by water flowing from a distance, are unfit for cultivation and pasture, and that there is no natural irrigation of them except by the waters flowing down from the Sierra Nevada through the Kern River, as aforesaid.

That in order to produce crops on plaintiffs' said lands it is necessary that they should be irrigated during the winter and spring; and if they are not irrigated then, subsequent irrigation is useless, and the lands must remain unproductive and desert till the next year.

That plaintiffs are informed and believe, and there-
34 fore aver, that by the natural flow of the waters of the Kern River, as aforesaid, plaintiffs' said lands have always been wet and naturally irrigated during the winter and spring, except in seasons of extreme drought; so that it has almost always been possible, without artificial irrigation, to cultivate them and raise crops and pasture on them, and it would be possible to do so this year were it not for the diversion, appropriation and consumption of the waters by defendants, as aforesaid.

That plaintiffs are informed and believe, and therefore aver, that of their said lands a part has been, dur-
35 ing the present season, ploughed up for planting, and of the portion so ploughed a part has been sown with grain for raising crops; but that by reason of the diversion and appropriation and consumption of the water by the defendants, as aforesaid, all of plaintiffs' said lands are now, and since July, 1878, or thereabouts, have been suffering from drought, and it has not during the last winter been possible to get water to irrigate them, or any part of them, and it is not possible to do so now; and irrigation now would come too late to do any good. That by reason of the diversion and appropriation of water, as aforesaid, the

36 crops already planted, as aforesaid, will none of them mature, but are all lost; and that the season for planting such crops as can be profitably raised on plaintiffs' said lands is gone by for this year, and it would not be possible to raise any crops there this year, even if water for irrigation were to be had now.

That there are no means of irrigating plaintiffs' said lands save by the waters of the Kern River, which have been diverted by the defendants, as aforesaid.

Wherefore plaintiffs' pray that the defendants may answer the premises, and that this Honorable Court will hear and determine the claims of the defendants
37 to the water, as aforesaid; and if any of the defendants have the right to appropriate any of said water, that the Court will determine how much. And that the Court will adjudge and declare that, as against the plaintiffs, and each and every of them, and except as to such quantities of water as certain defendants may be found to be respectively entitled to, the defendants, and each of them, have no right to use or divert the waters of the said Kern River, or any portion thereof, for irrigation, or to use or divert them in any manner so as to diminish the flow of the same, or prejudice
38 the riparian rights of the plaintiffs as owners of the lands, as aforesaid, and that plaintiffs, and each of them, may be quieted in their right to the natural flow of the water.

And that this Honorable Court will, by its decree herein, stay perpetually and enjoin the defendants, and each of them, and all their agents, servants and attorneys (except such of them as may be found to have the right to certain quantities of the water respectively, and as to such quantities), from taking out, diverting or using the waters of the said Kern River, and of any natural water courses through which any of the said
39 waters flow towards plaintiffs' said lands, for the purposes of irrigation, or for any purpose in which the water is consumed or diminished in volume, and from interfering in any way with the said waters above plaintiffs' said lands, to the injury thereof.

And that the Court will determine and declare the amount of damage done to each of the plaintiffs by the wrongful acts of defendants, as aforesaid, and will order, adjudge and decree that defendants pay to each plaintiff the amount he is entitled to receive.

And that until the final hearing and determination of this cause, and while the same is pending, the de-

40 fendants, and each of them, may be restrained and enjoined from the commission of any of the acts herein sought to be perpetually enjoined.

And that plaintiffs may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this Honorable Court shall seem meet, and their costs of suit.

ALFRED A. COHEN,
Attorney for Plaintiffs.

DELOS LAKE,
R. E. HOUGHTON,
Of Counsel.

41

STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

John H. Redington, being duly sworn, says that he is one of the plaintiffs in the above entitled suit; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters he believes it to be true.

JOHN H. REDINGTON.

Subscribed and sworn to, this 12th day of May,
42 A. D. 1879, before me,

[SEAL] JAMES MASON, Notary Public.

SCHEDULE A.

All of the following land in township twenty-five south, range twenty-one east, Mount Diablo base and meridian. All of section five; all of section ten; all of section eleven; all of section twelve; all of section thirteen; all of section fourteen; all of section twenty-four; all of section twenty-five; all of section thirty-
43 six; south half of section four; northeast quarter, north half of northwest quarter, southeast quarter of northwest quarter, north half of southeast quarter, southeast quarter of southeast quarter of section six; north half of northeast quarter, northeast quarter of northwest quarter, fractional northwest quarter of northwest quarter, fractional southeast quarter of northeast quarter of section eight; north half, north half of southeast quarter, southeast quarter of southeast quarter, fractional southwest quarter of southeast quarter, northeast quarter of southwest quarter of section nine; northeast quarter, north half of northwest

quarter, southeast quarter of northwest quarter, fractional southwest quarter of northwest quarter, north half of southeast quarter, southeast quarter of southeast quarter, fractional southwest quarter of southeast quarter, fractional northeast quarter of southwest quarter of section fifteen; north half, north half of south half, south half of southeast quarter, southeast quarter of southwest quarter, fractional southwest quarter of southwest quarter of section twenty-three; northeast quarter, northeast quarter of northwest quarter, fractional southeast quarter of northwest quarter, southeast quarter, fractional east half of southwest quarter of section twenty-six; east half, east half of southwest quarter, fractional east half of northwest quarter of sectien thirty-five.

All of the following land in township twenty-five south, range twenty-two east, same base and meridian. All of section twenty-four; all of section thirty-one; all of section thirty-two; all of section thirty-three; all of section thirty-four; north half, southeast quarter, northeast quarter of southwest quarter of section twenty-five; north half, southwest quarter, northwest quarter of southeast quarter of section twenty-six.

All the following land in township twenty-six south, range twenty-one east, same base and meridian. East half, north half of northwest quarter, southeast quarter of northwest quarter of section one; north half, southwest quarter of northeast quarter, northeast quarter of northwest quarter of section two; east half, southwest quarter of section twelve; east half, east half of west half of section thirteen; east half of section twenty-four; east half of east half of section twenty-five.

All of the following land in township twenty-six south, range twenty-two east, same base and meridian. All of section four; all of section five; all of section six; all of section seven; all of section eight; all of section fifteen; all of section sixteen; all of section seventeen; all of section eighteen; all of section nineteen; all of section twenty; all of section twenty-one; all of section twenty-two; all of section twenty-nine; all of section thirty; all of section thirty-two; west half, west half of east half, northeast quarter of northeast quarter of section three; north half, west half of southwest quarter; northeast quarter of southwest quarter of section nine; northwest quarter, northwest quarter of northeast quarter of section ten; southeast quarter of southwest

quarter of section eleven; southwest quarter, southwest quarter of northwest quarter of section thirteen; south half, northwest quarter, south half of northeast quarter, northwest quarter of northeast quarter of section fourteen; northwest quarter, north half of northeast quarter, southwest quarter of northeast quarter, northwest quarter of southwest quarter of section twenty-three; west half, north half of northeast quarter, southwest quarter of northeast half of section twenty-eight; north half, north half of south half, south half of southeast quarter, southeast quarter of southwest quarter of section thirty-one; west half, southwest half of southeast quarter of section thirty-three.

All of the following land in township twenty-eight south, range twenty-two east, Mount Diablo base and meridian. All of section four; east half of section five; east half of northeast quarter; northeast quarter of southeast quarter of section eight; all of section nine; all of section sixteen; east half, east half of west half of section twenty-one; west half of section twenty-two; south half of section twenty-six; north half, southeast quarter, north half of southwest quarter, and southeast quarter of southwest quarter of section twenty-seven; north half of northeast quarter, southeast quarter of northeast quarter of section twenty-eight; north half of northeast quarter, southeast quarter of northeast quarter, northeast quarter of southeast quarter of section thirty-four; all of section thirty-five.

All of the following land in township twenty-nine south, range twenty-two east, same base and meridian. All of section one; north half of northeast quarter, southeast quarter of northeast quarter of section two; northeast quarter, northeast quarter of southeast quarter of section twelve.

All of the following land in township twenty-nine south, range twenty-three east, same base and meridian. West half of section six; north half, southeast quarter, north half of southwest quarter, southeast quarter of southwest half of section seven; west half of section eight; west half of section sixteen; east half, northwest quarter, north half of southwest quarter, southeast quarter of southwest quarter of section seventeen; north half of northeast quarter, southeast quarter of northeast quarter, of section eighteen; north half of northeast quarter, southeast quarter of northeast quarter of section twenty; all of section twenty-one; west half of

section twenty-two; all of section twenty-six; north half, southeast quarter, north half of southwest quarter of section twenty-seven; northeast quarter, northeast quarter of northwest quarter of section twenty-eight; northeast quarter of northeast quarter of section thirty-four; northeast quarter, north half of northwest quarter, southeast quarter of northwest quarter, northeast quarter of southeast quarter of section thirty-five; all of section thirty-six.

All of the following land in township thirty south, range twenty-three east, same base and meridian. North half of northeast quarter, southeast quarter of northeast quarter, northeast quarter of northwest quarter of section one.

All of the following land in township thirty south, range twenty-four east, same base and meridian. All of section five; north half, north half of southwest quarter, north half of southeast quarter, southeast quarter of southeast quarter of section six; northeast quarter, northeast quarter of northwest quarter, northeast quarter of southeast quarter of section eight; east half, northwest quarter, north half of southwest quarter of section nine; west half of section ten.

[In all cases where land is described in this Schedule as a "fractional" portion of a subdivision of a section, it is the swamp land in such "fractional" portion according to the United States Survey.]

Schedule B.

All of the following land in township twenty-eight south, range twenty-two east, Mount Diablo base and meridian: Southwest quarter of southwest quarter of section two; all of section ten; south half of southwest quarter, southwest quarter of southeast quarter of section twelve; all of section fourteen; east half of section twenty-two; all of section twenty-four; north half of section twenty-six; all of section thirty-six.

All of the following land in township twenty-eight south, range twenty-three east, same base and meridian: South half, northwest quarter of section eighteen; west half, southeast quarter of section twenty; all of section thirty; all of section thirty-two.

All the following land in township twenty-nine south, range twenty-three east, same base and meridian: All of section four; east half of section six; east half of section eight; all of section ten; south half, northwest

quarter, south half of northeast quarter, northwest quarter of northeast quarter of section fourteen; east half of section sixteen; east half of section twenty-four.

All of the following land in township twenty-nine south, range twenty-four east, same base and meridian. South half of southwest quarter, northwest quarter of southwest quarter of section twenty; southwest quarter, southwest quarter of northwest quarter, southwest quarter of southeast quarter of section twenty-eight; all of section thirty; all of section thirty-two; southwest quarter, south half of northwest quarter, west half of southeast quarter, southeast quarter of southeast quarter of section thirty-four.

All of the following land in township thirty south, range twenty-four east, same base and meridian. West half of the northwest quarter; west half of southwest quarter, southeast quarter of southwest quarter; southwest quarter of southeast quarter of section two; all of section four; east half of section ten; west half, southeast quarter, west half of northeast quarter, southeast quarter of northeast quarter of section fourteen; west half of the northwest quarter, north half of southwest quarter, northwest quarter of southeast quarter, southeast quarter of southeast quarter of section twenty-four.

All of the following land in township thirty-one south, range twenty-five east, same base and meridian: Southwest quarter of the southeast quarter; south half of southwest quarter; northwest quarter of southwest quarter; the fractional southeast quarter of southeast quarter (lot six); the fractional northeast quarter of southwest quarter of section (part of lot four) fifteen; the south half, south half of northwest quarter, the fractional south half of northeast quarter (lots seven and eight) of section sixteen; the south half, south half of northeast quarter, northwest quarter of northeast quarter, south half of northwest quarter, northeast quarter of northwest quarter of section seventeen; the southeast quarter, south half of southwest quarter, northeast quarter of southwest quarter of section eighteen; the whole of section twenty-two; the south half, southwest quarter of northeast quarter, south half of northwest quarter, northwest quarter of northwest quarter, the fractional northeast quarter of northwest quarter (lot five), the fractional southeast quarter of northeast quarter (lot six) of section twenty-three; the southwest quarter of southeast quarter, south half of

southwest quarter, northwest quarter of southwest quarter, the fractional northeast quarter of southwest quarter (lot four), the fractional southeast quarter of southeast quarter (lot six) of section twenty-four; all of section twenty-five.

All of the following land in township thirty-one south, range twenty-six east, same base and meridian: The southwest quarter of southeast quarter, west half of southwest quarter, southeast quarter of southwest quarter, the fractional northeast quarter of southwest quarter (part of lot four), the fractional southeast quarter of southeast quarter (lot six) of section twenty-seven; the south half of section twenty-eight; the south half, south half of northwest quarter, the fractional southwest quarter of northeast quarter (lot seven), the fractional southeast quarter of northeast quarter (lot eight) of section twenty-nine; the south half, southeast quarter of northeast quarter, the fractional southwest quarter of northeast quarter (lot six), the fractional southeast quarter of northwest quarter (lot seven) of section thirty; all of section thirty-one; all of section thirty-two; all of section thirty-three; all of section thirty-four; all of section thirty-five; the southwest quarter, southwest quarter of southeast quarter, southwest quarter of northwest quarter, the fractional northwest quarter of northwest quarter (lot five), the fractional northwest quarter of southeast quarter (lot seven), the fractional southeast quarter of northwest quarter (lot six), the fractional southeast quarter of southeast quarter (lot eight) of section thirty-six.

All of the following land in township thirty-two south, range twenty-six east, same base and meridian: All of section one; all of section two; all of section three; all of section four; all of section five; all of section six.

All of the following land in township thirty-two south, range twenty-seven east, same base and meridian: The south half of southwest quarter, the fractional north half of southwest quarter (lot four), the fractional southwest quarter of southeast quarter (lot five), the fractional southeast quarter of southeast quarter (lot six) of section one; the fractional south half of northwest quarter of northwest quarter (part of lot four), the fractional southeast quarter of northeast quarter (part of lot six), the southwest quarter of northeast quarter, south half of northwest quarter of section two; the south half of northeast quarter, south-

64 east quarter of northwest quarter of section three; the south half of northwest quarter, southwest quarter of northeast quarter of section four; the south half of northeast quarter, northwest quarter of section five; all of section six; all of section seven; the northeast quarter of section twelve.

SCHEDULE C.

All of the following land in township twenty-seven south, range twenty-two east, Mount Diablo base and
65 meridian: Southwest quarter of northwest quarter, west half of southwest quarter, southeast quarter of southwest quarter of section three; east half of northeast quarter, northwest quarter of northeast quarter, east half of southeast quarter of section seven; south half of southeast quarter, west half of southwest quarter, southeast quarter of southwest quarter of section thirteen; east half of northeast quarter of section nineteen; southeast quarter, east half of southwest quarter, northwest quarter of southwest quarter of section twenty-three; northeast quarter, northeast quarter of northwest quarter of section twenty-five; east half,
66 east half of northwest quarter, east half of southwest quarter of section twenty-nine; all of section thirty-three.

All of the following land in township twenty-eight south, range twenty-two east, same base and meridian: West half, southeast quarter, southwest quarter of northeast quarter of section three; south half, southwest quarter of northeast quarter, west half of northwest quarter, southeast quarter of northwest quarter of section eleven; all of section thirteen; all of section fifteen; all of section twenty-three; all of section twenty-five.

67 All of the following land in township twenty-eight south, range twenty-three east, same base and meridian: All of section twenty-nine; all of section thirty-one; west half, southeast quarter of section thirty-three; all of section nineteen.

All of the following land in township twenty-nine south, range twenty-three east, same base and meridian: Southwest quarter, southwest quarter of southeast quarter, southwest quarter of northwest quarter of section three; west half of southwest quarter, southeast quarter of southwest quarter of section eleven; southwest quarter, southwest quarter of southeast

quarter, southwest quarter of northwest quarter of section thirteen; all of section twenty-five.

All of the following land in township twenty-nine south, range twenty-four east, same base and meridian: West half, southeast quarter, southwest quarter of northeast quarter of section nineteen; south half, northwest quarter, west half of northeast quarter, southeast quarter of northeast quarter of section twenty-nine; all of section thirty-one; all of section thirty-three.

All the following land in township thirty south, range twenty-four east, same base and meridian: All of section three; north half, southwest quarter, west half of southeast quarter, northeast quarter of southeast quarter of section eleven.

All the following land in township thirty-one south, range twenty-four east, same base and meridian: South half of southeast quarter of section thirteen; east half, east half of northwest quarter, east half of southwest quarter of section twenty-four; east half, east half of the northwest quarter, east half of southwest quarter of section twenty-five; east half, east half of northwest quarter, southwest quarter of northwest quarter, east half of southwest quarter, northwest quarter of southwest quarter of section thirty-six.

SCHEDULE D.

All of the following lands in township twenty-seven south, range twenty-two east, Mount Diablo base and meridian: All of section five; all of section nine; all of section fifteen; all of section seventeen; all of section twenty-one; the north half of section twenty-three.

SCHEDULE E.

All of the following land in township twenty-nine south, range twenty-three east, Mount Diablo base and meridian: All of section fifteen; east half of section twenty-two; all of section twenty-three; west half of section twenty-four.

SCHEDULE F.

All of the following land in township twenty-nine south, range twenty-three east, Mount Diablo base and meridian: All of section five; all of section nine.

72 SCHEDULE G.

All of the following land in township thirty south, range twenty-four east, Mount Diablo base and meridian: Southwest quarter of southwest quarter of section thirteen; northeast quarter, north half of southeast quarter, north half of northwest quarter, southeast quarter of northwest quarter, northeast quarter of southwest quarter of section fifteen; north half of northeast quarter, southeast quarter of northeast quarter, northeast quarter of northwest quarter of section twenty-three.

73 Endorsed: Complaint. Filed May 12, 1879.
THOS. H. REYNOLDS, Clerk.
By E. Gilson, Dep. Clk.
Filed Sep. 2, 1880.
N. R. PACKARD, Deputy Clerk.

Order Assigning Cause.

[Title of Court and Cause.]

It is ordered that the above entitled cause (pending in the District Court of the Fourth Judicial District
74 of the State of California, in and for the City and County of San Francisco, on the 31st day of December, A.D. 1879,) be and the same is hereby assigned to Evans, Judge, Department No. Seven of this Court.
T. W. FREELON,
Presiding Judge.
Endorsed: Filed May 10, 1880.
WILLIAM A. STUART, Clerk.
By H. C. Biggs, Deputy Clerk.
Filed Sept. 2, 1880.
A. T. LIGHTNER, Clerk.
75 By N. R. Packard, Deputy Clerk.

Substitution of Attorneys for Plaintiff.

[Title of Court and Cause.]

I hereby consent that Stetson & Houghton, Esqs., be substituted in my place and stead as attorneys of record for the plaintiffs in the above entitled action.
Dated Feb. 27, 1880.
ALFRED A. COHEN,
Attorney for Plaintiffs.

76 Endorsed: Filed May 10, 1880.
WILLIAM A. STUART, Clerk.
By Harry C. Biggs, Deputy Clerk.
Filed Sep. 2, 1880.
A. T. LIGHTNER, Clerk.
By N. R. Packard, Deputy Clerk.

Consent to Substitution of Attorney for Plaintiffs.

[Title of Court and Cause.]

77 We, the undersigned, plaintiffs in the above entitled action, hereby consent that Stetson & Houghton, Esqs., be substituted in the place of Alfred A. Cohen as attorneys of record for the plaintiffs in the above entitled action.

Dated May 8, 1880.

HENRY MILLER,
per JOHN H. BOLTON.
CHARLES LUX,
per JOHN H. BOLTON.
JAMES C. CROCKER,
78 per JOHN H. BOLTON.
JOHN H. REDINGTON.
HORATIO P. LIVERMORE.
L. H. BONESTELL.
HORATIO STEBBINS.

Endorsed: Filed May 10, 1880.
WILLIAM A. STUART, Clerk.
By Harry C. Biggs, Deputy Clerk.
Filed September 2d, 1880.
A. T. LIGHTNER, Clerk.
By N. R. Packard, Deputy Clerk.

79 ***Consent to Substitution of Attorneys for Plaintiff.***

[Title of Court and Cause.]

We, the underigned, plaintiffs in the above entitled action, hereby consent that Stetson & Houghton, Esqs., be substituted in the place of Alfred A. Cohen, Esq., as attorney of record for the plaintiffs in the above entitled action.

Dated May 8, 1880.

F. A. TRACY.

80 Endorsed: Filed May 10, 1880.
WILLIAM A. STUART, Clerk.
By Harry C. Biggs, Deputy Clerk.
Filed September 2, 1880.
A. T. LIGHTNER, Clerk.
By N. R. Packard, Deputy Clerk.

Summons.

[A summons was issued on the 10th day of May 1880, and served on certain defendants named therein, among whom was the Kern River Land and Canal Company.]
81

Demurrer to Complaint.

[Certain of the defendants, among whom was the Kern River Land and Canal Company, filed demurrers to the complaint, but an amended complaint was filed before they were disposed of.]

Dismissal.

[Before the filing of the amended complaint herein,
82 the action was from time to time dismissed as to all the defendants, except the defendant The Kern River Land and Canal Company.]

Order Changing Place of Trial.

[Pursuant to demand, and notice for order changing place of trial, filed June 29, 1880, an order was made in the Superior Court of San Francisco on the 17th day of August, 1880, in the words and figures following]:

[Title of Court and Cause.]

83 Present—Hon. OLIVER P. EVANS, Judge.

Defendants' motion to change the place of trial of this action, having been heretofore submitted and the affidavits and arguments of counsel duly considered by the Court: It is ordered that the place of trial of this action be changed to Kern County, California, on the ground that the property, the subject matter of this action, is situated in said county.

I hereby certify the foregoing to be a full, true and correct copy of an order entered on the minutes of said Superior Court, Department No. 7, in the above entitled cause.

84 Attest my hand and the seal of said Superior Court, this first day of September, 1880.

[SEAL] WILLIAM A. STUART, Clerk.
By D. C. Van Nostrand, Deputy Clerk.

Amended Complaint.

In the Superior Court of the County of Kern, State of California.

CHARLES LUX,
85 HENRY MILLER, and
JAMES C. CROCKER,

Plaintiffs,

vs.

THE KERN RIVER LAND AND CANAL COMPANY,

Defendants.

Now come Charles Lux, Henry Miller and James C. Crocker, the plaintiffs above named, after demurrer to complaint herein, and before the trial of the issue
86 of law thereon, and the other parties plaintiff having withdrawn from the action, and the place of trial having been changed to Kern County by an order of the Superior Court of San Francisco, made and entered on the 17th day of August, Anno Domini 1880, and the action having been dismissed as to all the defendants (except the one hereinabove named) by dismissals filed, one in the Superior Court of San Francisco, on the 6th day of August, Anno Domini 1880, and the other in the Superior Court of Kern County, on the 11th day of December, Anno Domini 1880; these plaintiffs now file
87 this, their amended complaint, against the defendant, The Kern River Land and Canal Company, and for cause of action allege as follows:

That plaintiffs are informed and believe and therefore aver, that at the commencement of this action and prior thereto, the defendant, The Kern River Land and Canal Company was a Corporation, created, organized and existing under and by virtue of the laws of the State of California.

That plaintiffs were at the commencement of this action the owners in fee, seized and possessed (and for more than a year theretofore they and their grant-

88 ors were such owners) of all those certain lands situate in the County of Kern, in the State of California, and particularly described (according to the surveys made by the authority of the United States of America, and referred to the Mount Diablo base and meridian) in a certain schedule which is hereto annexed, marked "Schedule M," and made a part of this complaint.

That said lands are swamp and overflowed lands, and as such belonged to the State of California, until the year 1876 and later, in which year and at various times afterwards, and before the commencement of this action, they were granted by the State to plaintiffs
89 or their grantors.

That the said lands are situated along and bordering on Buena Vista Slough, which is, and as plaintiffs are informed and believe from time immemorial has been a part of the natural stream or water course known as the Kern River, and through it the waters of said Kern River flow and always have flowed, on their way to Tulare Lake.

That the said Kern River is a natural stream or water course rising in the Sierra Nevada and debouching from the mountains into the plains, about ten miles easterly from the town of Bakersfield, in said Kern
90 County, whence as far down as a point in Township Twenty-nine (29) south, Range Twenty-eight (28) east, Mount Diablo base and meridian (according to the United States surveys), it has always, as plaintiffs are informed and believe, within the memory of man, flowed in the same channel; but that after reaching said point the course of the river was anciently, and down to the year 1862, along a channel known as the "South Fork," which diverged from the present stream to the left or southerly, and, following a course almost due south, emptied into Kern Lake aforesaid, at its
91 easterly end; and that the waters of the said Kern River, up to 1862, as aforesaid, used to run southerly through said South Fork, and thence northerly through Kern Lake, Buena Vista Lake (and the connecting channel between them), and Buena Vista Slough, into Tulare Lake.

That plaintiffs are informed and believe and therefore aver, that in the year 1862 a flood partially closed the said South Fork at the point aforesaid, and at the same time and suddenly opened a new channel, which coincided with the present channel of the river for about three (3) miles below the point aforesaid, and

92 then turned off to the left and followed the course of the slough now known as "Old River," and emptied into the Connecting Channel aforesaid; and a part of the water of the Kern River, which had before flowed through the South Fork, as aforesaid, was then diverted therefrom into said Old River, and thereafter flowed through the same toward Tulare Lake, until the winter of 1867–68, when another flood opened the present main channel of the river, which is sometimes known as "New River," and which diverges from Old River toward the right or northerly, and joins Buena Vista Slough in or near Section Thirty (30), Township Thir-
93 ty (30) south, Range Twenty-five (25) east, Mount Diablo base and meridian, according to the United States surveys.

That the waters of the said Kern River naturally flow, and from time immemorial have flowed to and through the said Buena Vista Slough, and along, by, through, over and upon plaintiff's said lands, thereby irrigating them and making them fit for cultivation and pasture, besides supplying water thereon for stock and for agricultural and domestic purposes, and for all other purposes for which an owner of lands bordering on a running stream has a right to use the waters
94 thereof; and from time immemorial the said waters have done so, and would continue to do so, were it not for the diversion and appropriation and consumption of them by the defendant as hereinafter set forth; and that none of the changes of the course of the river, hereinbefore mentioned, have affected the supply of water to the said Buena Vista Slough.

That the aforementioned courses or channels of the Kern River, as well as the sloughs and lakes herein mentioned, are shown upon a diagram which is hereto annexed, marked "Exhibit Y," and made part of this
95 amended complaint.

That heretofore, to wit: on or about the day of A.D. 1876, the defendant, well knowing the premises and intending to injure the plaintiffs and the said land, wrongfully dug away and removed a part of the bank of the said Kern River, at a point above the said lands of plaintiffs and constructed a large canal or ditch, leading away from said river at that point towards the north, and known as the Calloway Canal, and thereby, and by other works done and erected, diverted and appropriated a portion of the water of the Kern River and consumed the same,

96 and prevented it from flowing, to, along, by, through, over or upon plaintiffs' said lands, as it would naturally have done, if it had not been so diverted. And that defendant has ever since claimed the right so to divert and appropriate and consume such water, and has ever since continued to do so, and is doing it still.

That plaintiffs are informed and believe, and therefore aver, that the lands to irrigate which defendant has diverted and is diverting the water as aforesaid, are not, and never have been within the memory of man, naturally irrigated at all by any of the water of the Kern River, or otherwise; nor is the right to the
97 flow of said waters naturally incident or appurtenant to the same or to any part thereof.

That plaintiffs are informed and believe, and therefore aver, that by reason of such taking out and diversion of the waters of the Kern River by the defendant, no water ran through, or into the said Buena Vista Slough, nor to, through, by, along, over or upon plaintiffs' said lands between July, 1878, or thereabouts, and the commencement of this action; and in consequence of the aforesaid diversion and appropriation of said waters, the said Buena Vista Slough during all that time was dry, so that the water of the Kern River,
98 instead of irrigating and moistening plaintiffs' said lands, and supplying water thereon for general uses, as it would naturally have done. entirely failed to do so, and during all that time plaintiffs' said lands were deprived of their natural moisture, and in consequence became dry and deteriorated in value; and the same is certain to happen every year in the future, so long as the aforesaid diversion and appropriation of the water by the defendant shall continue, except in years when the rainfall is much above the average.

That owing to the nature of the climate and the
99 country, and the slight rainfall where plaintiffs' said lands are situated, the same, unless irrigated by water flowing from a distance, are unfit for cultivation and pasture, and that there is no natural irrigation of them except by the waters flowing down from the Sierra Nevada through the Kern River, as aforesaid, and no means of irrigating them at all, save by the waters of Kern River.

That plaintiffs are informed and believe, and therefore aver, that plaintiffs' said lands have always, (except in seasons of extreme drought and except when prevented by unlawful diversion), been wet and natu-

100 rally irrigated during the winter and spring, by the natural flow of the waters of the Kern River, which, waters have caused them to be swamp and overflowed lands as aforesaid; so that it has always been possible, without artificial irrigation, to cultivate them and raise crops and pasture on them; which facts and the fact that the said lands were designated by the United States Government and the State of California, as "Swamp and Overflowed Lands," as aforesaid, constituted the principal inducement to plaintiffs to purchase the same; and on the faith that the same would have the benefit of the natural irrigation and overflow,
101 as well as water for other uses, as aforesaid, plaintiffs paid large sums of money for the same, and have, since the same were so purchased from the State, expended large sums of money in improving the same, and in constructing works for controlling, regulating and utilizing the water naturally supplied to them.

And plaintiffs further allege that from the time of the diversion of the water by the defendant as aforesaid, down to the time when this action was commenced, and by reason of said diversion, their said land was continually drying up and becoming less fit to produce crops and support cattle, and will continue to do so, unless defendant be restrained and enjoined from diverting
102 the water as aforesaid.

That in consequence of the diversion and appropriation and consumption of the water by the defendant as aforesaid, it has become necessary to pump at great expense the water needed for the cattle on plaintiffs' said lands, and it will be necessary to continue to do so in future, unless defendant be restrained from so diverting and appropriating and consuming the same.

And plaintiffs further allege that the Kern River rises among the highest mountains of the Sierra
103 Nevada, where there is usually in the winter a great accumulation of snow; that the melting of the snow is always liable to cause great and irresistible floods. That the river-bed below the foot-hills is shallow and of insufficient capacity in time of flood to carry off the waters, which then sweep over the adjacent country.

That plaintiffs are informed and believe, and therefore aver, that after the diversion of the water by defendant as aforesaid, and by reason thereof, willows and other trees and shrubs began to grow up in the bed of the Kern River, below the point where the defendant has diverted the water as aforesaid, and the same

104 are still growing and becoming year by year more serious obstructions to the river channel; so that there is danger that in times of flood the water may be forced aside from the present channel of the river, and be diverted entirely from plaintiffs' land to the great and serious detriment thereof.

And plaintiffs further allege that the country along the Kern River, below where the South Fork branches off as aforesaid, for many miles on both sides of the river is destitute of hills, and slopes gradually towards the chain of lakes, consisting of Kern Lake, Buena Vista Lake, Goose Lake and Tulare Lake, which oc-
105 cupy the lowest depression of the valley between the Sierra Nevada and the Coast range of mountains; that in this chain of lakes the general flow of the water is northerly so that Tulare Lake and Goose Lake are lower than the other two; that from any point on the Kern River from the mountains down to Buena Vista Slough, a line drawn across the country to Tulare Lake by way of Goose Lake would be much shorter than the present course taken by the water to reach Tulare Lake; that the soil between Kern River, (below the foot-hills), and Goose Lake is everywhere light and sandy, and such as would offer little resistance to
106 a current of water; that several large canals have been made on the northerly side of the Kern River, leading towards Goose Lake, and connecting with an old slough, which continues on and leads into Goose Lake, which itself connects with Tulare Lake; and as plaintiffs are informed and believe, if the channel of the river be suffered to become obstructed by trees and shrubs as aforesaid, there is great and serious danger that in case of a flood in the river, the whole body of its waters may take the shortest course to Goose Lake, and the river bed be permanently shifted,
107 and its waters diverted forever from plaintiffs' said lands, which in such an event would become almost worthless.

That plaintiffs are informed and believe, and therefore aver, that the defendant is not the owner of any land anywhere, and is not and never has been a riparian proprietor on the Kern River, nor on any of the waters, sloughs or channels thereof, nor on the lakes aforesaid.

That as plaintiffs are informed and believe, and therefore aver, the injuries to plaintiffs' said land in consequence of the acts of the defendant as aforesaid, will be irreparable, inasmuch as they will cause the

108 ruin of the same, if they are suffered to continue; in which case they will be constantly recurring grievances, and such as cannot be compensated by damages; and that plaintiffs have and will have no plain, speedy or adequate relief at law.

Wherefore plaintiffs pray that the defendant may answer the premises. and that this Honorable Court will hear and determine the claims of the defendant to the water as aforesaid; and if the defendant has the right to appropriate any of said water, that the Court will determine how much. And that the Court will adjudge and declare that, as against plaintiffs, the de-
109 fendant has no right to use or divert the waters of the said Kern River, or any portion thereof, for irrigation, or to use or divert them in any manner so as to diminish the flow of the same through or into the said Buena Vista Slough, or prejudice the riparian rights of plaintiffs as owners of the lands described in Schedule M, aforesaid; and that plaintiffs may be quieted in their right to the natural flow of the water.

And that this Honorable Court will, by its decree herein, stay perpetually and enjoin the defendant and all its agents, servants, and attorneys, from taking out,
110 diverting, or using the waters of the said Kern River (and of any natural water-courses through which any of the said waters flow towards plaintiffs' said lands), for the purposes of irrigation, or for any purpose in which the water is consumed or diminished in volume, and from interfering in any way with the said waters above plaintiffs' lands to the injury thereof.

And that the Court will determine and declare the amount of damage done to plaintiffs by the wrongful act of defendant as aforesaid, and will order, adjudge and decree that defendant pay the same to plaintiffs.

111 And that until the final hearing and determination of this cause, and while the same is pending, the defendant may be restrained and enjoined from the commission of any of the acts herein sought to be perpetually enjoined.

And that plaintiffs may have such other and further relief in the premises as the nature of the circumstances of this case may require and to this Honorable Court shall seem meet, and their costs of suit.

STETSON & HOUGHTON,
Attorneys for Plaintiffs.

McALLISTER & BERGIN,
of Counsel for Plaintiffs.

112 STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

Charles Lux, being first duly sworn, deposes and says, that he is one of the plaintiffs in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that as to those matters he believes it to be true.

CHAS. LUX.

Subscribed and sworn to this 18th day of December, 1880, before me,
113

EDW'D CHATTIN,
[Notarial Seal] Notary Public.

SCHEDULE M.

All of the following land in Township Twenty-five (25) south, Range Twenty-one (21) east, of the Mount Diablo base and meridian: All of Section Five (5); all of Section Ten (10); all of Section Eleven (11); all of Section Twelve (12); all of Section Thirteen (13); all of Section Fourteen (14); all of Section Twenty-four (24); all of Section Twenty-five (25); all of Section
114 Thirty-six (36); south half of Section Four (4); northeast quarter, north half of northwest quarter, southeast quarter of northwest quarter, north half of southeast quarter, southeast quarter of southeast quarter of Section Six (6); north half of northeast quarter, northeast quarter of northwest quarter, fractional northwest quarter of northwest quarter, fractional southeast quarter of northeast quarter of Section Eight (8); north half, north half of southeast quarter, southeast quarter of southeast quarter, fractional southwest quarter of southeast quarter, northeast quarter of
115 southwest quarter of Section Nine (9); northeast quarter, north half of northwest quarter, southeast quarter of northwest quarter, fractional southwest quarter of northwest quarter, north half of southeast quarter, southeast quarter of southeast quarter, fractional southwest quarter of southeast quarter, fractional northeast quarter of southwest quarter of Section Fifteen (15); north half, north half of south half, south half of southeast quarter, southeast quarter of southwest quarter, fractional southwest quarter of southwest quarter of Section Twenty-three (23); northeast quarter, northeast quarter of northwest quarter, fractional

116 southeast quarter of northwest quarter, southeast quarter, fractional east half of southwest quarter of Section Twenty-six (26); east half, east half of southwest quarter, fractional east half of north-west quarter of Section Thirty-five (35).

All of the following land in Township Twenty-five (25) south, Range Twenty-two (22) east, of the same base and meridian: All of Section Twenty-four (24); all of Section Thirty-one (31); all of Section Thirty-two (32); all of Section Thirty-three (33); all of Section Thirty-four (34); north half, southeast quarter, northeast quarter of southwest quarter of Section
117 Twenty-five (25); north half, southwest quarter, northwest quarter of southeast quarter of Section Twenty-six (26).

All the following land in Township Twenty-six (26) south, Range Twenty-one (21) east, of the same base and meridian: East half, north half of northwest quarter, southeast quarter of northwest quarter of Section One (1); north half of northeast quarter, southwest quarter of northeast quarter, northeast quarter of northwest quarter of Section Two (2); east half, southwest quarter of Section Twelve (12); east half, east half of west half of Section Thirteen (13);
118 east half of Section Twenty-four (24); east half of east half of Section Twenty-five (25).

All of the following land in Township Twenty-six (26) south, Range Twenty-two (22) east, of the same base and meridian: All of Section Four (4); all of Section Five (5); all of Section Six (6); all of Section Seven (7); all of Section Eight (8); all of Section Fifteen (15); all of Section Sixteen (16); all of Section Seventeen (17); all of Section Eighteen (18); all of Section Nineteen (19); all of Section Twenty (20); all of Section Twenty-one (21); all of Section Twenty-two
119 (22); all of Section Twenty-nine (29); all of Section Thirty (30); all of Section Thirty-two (32); west half, west half of east half, northeast quarter of northeast quarter of Section Three (3); north half, west half of southwest quarter, northeast quarter of southwest quarter of Section Nine (9); northwest quarter, northwest quarter of northeast quarter of Section Ten (10); southeast quarter of southwest quarter of Section Eleven (11); southwest quarter, southwest quarter of northwest quarter of Section Thirteen (13); south half, northwest quarter, south half of northeast quarter, northwest quarter of northeast quarter of Section Four-

120 teen (14); northwest quarter, north half of northeast quarter, southwest quarter of northeast quarter, northwest quarter of southwest quarter of Section Twenty-three (23); west half, north half of northeast quarter, southwest quarter of northeast quarter of Section Twenty-eight (28); north half, north half of south half, south half of southeast quarter, southeast quarter of southwest quarter of Section Thirty-one (31); west half, southwest quarter of southeast quarter of Section Thirty-three (33).

All of the following land in Township Twenty-eight (28) south, Range Twenty-two (22) east, of the same
121 base and meridian: All of Section Four (4); east half of Section Five (5); east half of northeast quarter, northeast quarter of southeast quarter of Section Eight (8); all of Section Nine (9); all of Section Sixteen (16); east half, east half of west half of Section Twenty-one (21); west half of Section Twenty-two (22); south half of Section Twenty-six (26); north half, southeast quarter, north half of southwest quarter, and southeast quarter of southwest quarter of Section Twenty-seven (27); north half of northeast quarter, southeast quarter of northeast quarter of Section Twenty-eight (28); north half of northeast quarter, southeast quarter
122 of northeast quarter, northeast quarter of southeast quarter of Section Thirty-four (34); all of Section Thirty-five (35).

All of the following land in Township Twenty-nine (29) south, Range Twenty-two (22) east, of the same base and meridian: All of Section One (1); north half of northeast quarter, southeast quarter of northeast quarter of Section Two (2); northeast quarter, northeast quarter of southeast quarter of Section Twelve (12).

All of the following land in Township Twenty-nine
123 (29) south, Range Twenty-three (23) east, of the same base and meridian: West half of Section Six (6); north half, southeast quarter, north half of southwest quarter, southeast quarter of southwest quarter of Section Seven (7); west half of section Eight (8); west half of Section Sixteen (16); east half, northwest quarter, north half of southwest quarter, southeast quarter of southwest quarter of Section Seventeen (17); north half of northeast quarter, southeast quarter of northeast quarter of Section Eighteen (18); north half of northeast quarter, southeast quarter of northeast quarter of Section Twenty (20); all of Section Twenty-one

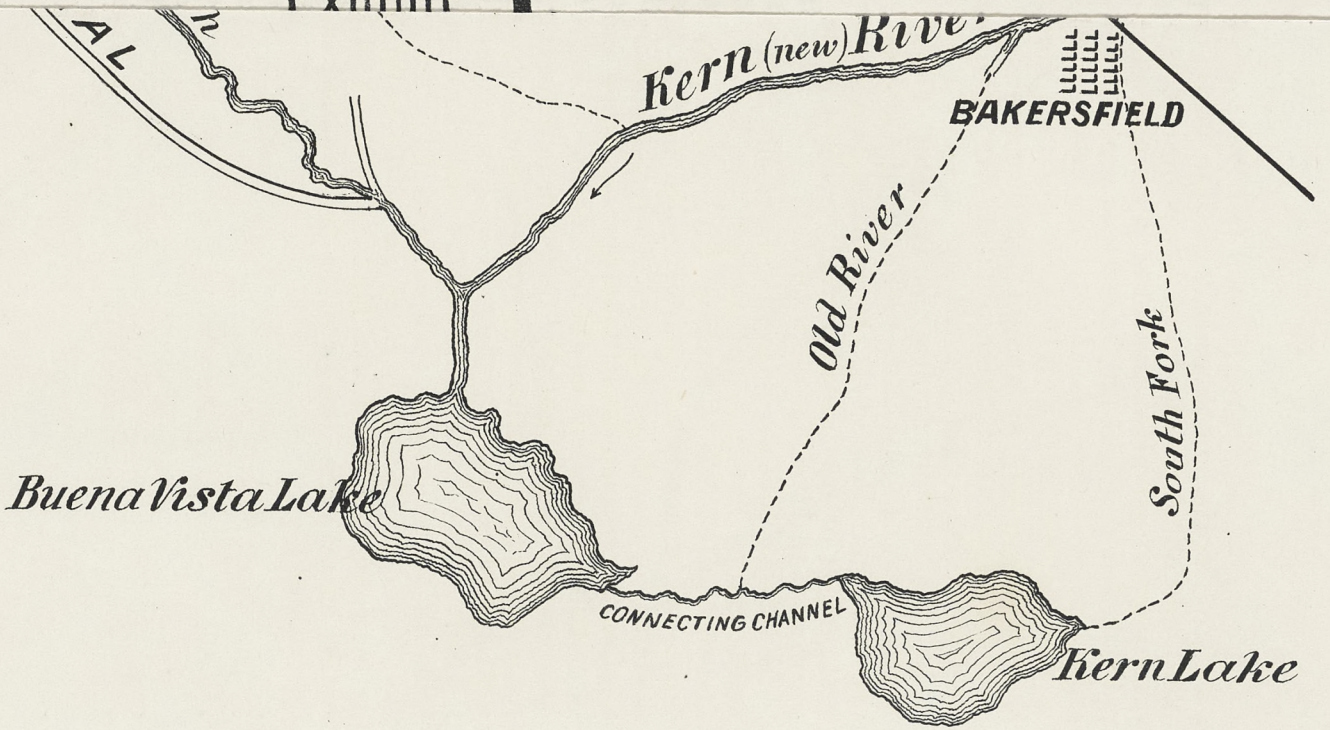
(21); west half of Section Twenty-two (22); all of Section (26); north half, southeast quarter, north half of southwest quarter of Section Twenty-seven (27); northeast quarter, northeast quarter of northwest quarter of Section Twenty-eight (28); northeast quarter of northeast quarter of Section Thirty-four (34); northeast quarter, north half of northwest quarter, southeast quarter of northwest quarter, northeast quarter of southeast quarter of Section Thirty-five (35); all of Section Thirty-six (36).

All of the following land in Township Thirty (30) south, Range Twenty-three (23) east, of the same base and meridian: North half of northeast quarter, southeast quarter of northeast quarter, northeast quarter of northwest quarter of Section One (1).

All of the following land in Township Thirty (30) south, Range Twenty-four (24) east, of the same base and meridian: All of Section Five (5); north half, north half of southwest quarter, north half of southeast quarter, southeast quarter of southeast quarter of Section Six (6); northeast quarter, northeast quarter of northwest quarter, northeast quarter of southeast quarter of Section Eight (8); east half, northwest quarter, north half of southwest quarter of Section Nine (9); west half of Section Ten (10).

[NOTE.—The word "fractional," when used in this schedule in connection with a subdivision of a section, indicates that only so much of the subdivision as is swamp and overflowed land (according to United States surveys) is intended to be included in this description].

Exhibit Y



LITH. BRITTON & REY, S. F.

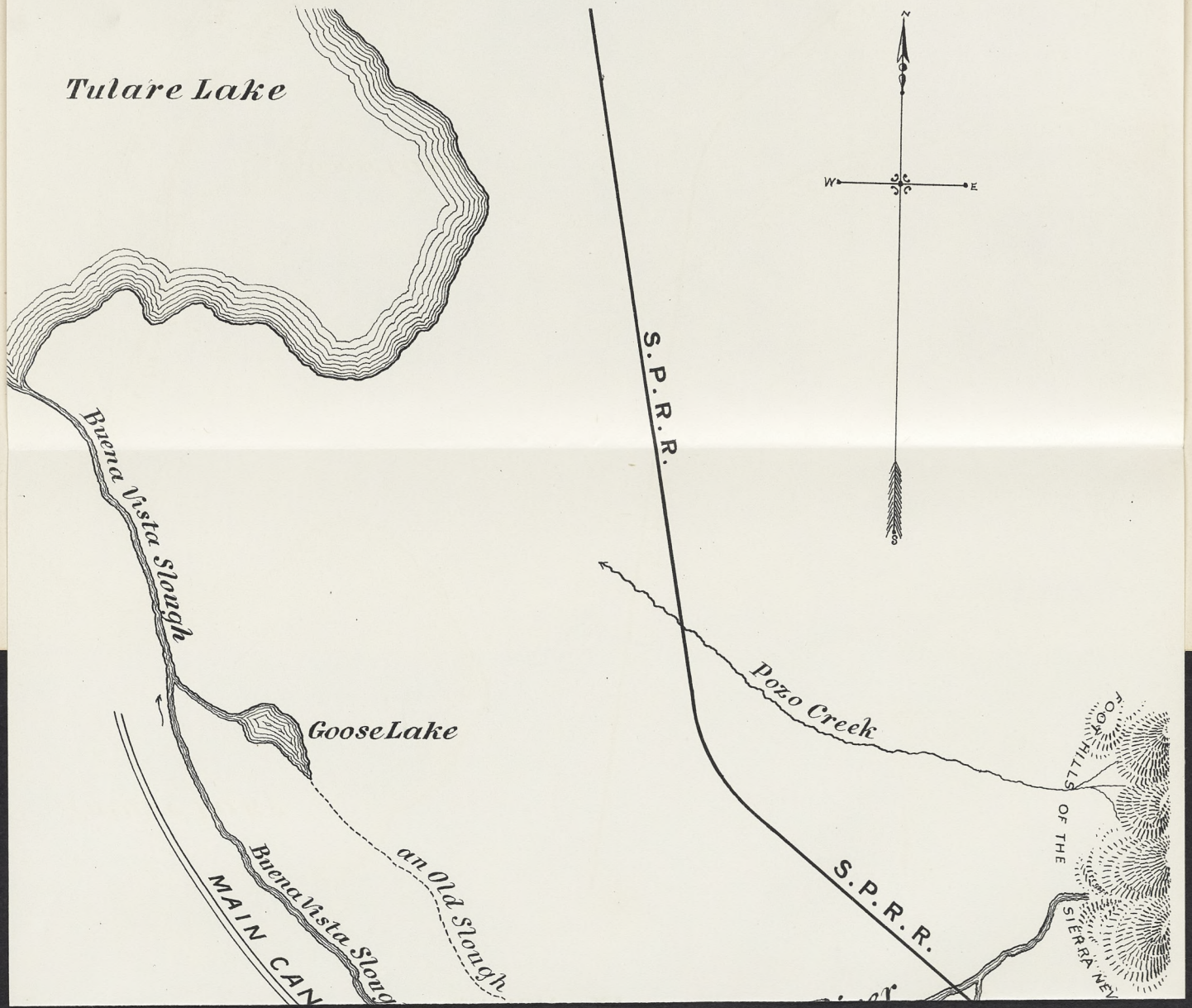
(21); west half of Section Twenty-two (22); all of Section (26); north half, southeast quarter, north half of southwest quarter of Section Twenty-seven (27); northeast quarter, northeast quarter of northwest quarter of Section Twenty-eight (28); northeast quarter of northeast quarter of Section Thirty-four (34); northeast quarter, north half of northwest quarter, southeast quarter of northwest quarter, northeast quarter of southeast quarter of Section Thirty-five (35); all of Section Thirty-six (36).

All of the following land in Township Thirty (30) south, Range Twenty-three (23) east, of the same base and meridian: North half of northeast quarter, southeast quarter of northeast quarter, northeast quarter of northwest quarter of Section One (1).

All of the following land in Township Thirty (30) south, Range Twenty-four (24) east, of the same base and meridian: All of Section Five (5); north half, north half of southwest quarter, north half of southeast quarter, southeast quarter of southeast quarter of Section Six (6); northeast quarter, northeast quarter of northwest quarter, northeast quarter of southeast quarter of Section Eight (8); east half, northwest quarter, north half of southwest quarter of Section Nine (9); west half of Section Ten (10).

[NOTE.—The word "fractional," when used in this schedule in connection with a subdivision of a section, indicates that only so much of the subdivision as is swamp and overflowed land (according to United States surveys) is intended to be included in this description].

Exhibit Y.


Tulare Lake
Buena Vista Slough
Goose Lake
an Old Slough
Buena Vista Slough
MAIN CAN
S.P.R.R.
Pozo Creek
S.P.R.R.
FOOTHILLS
OF THE
SIERRA NEV
N
W
E
S

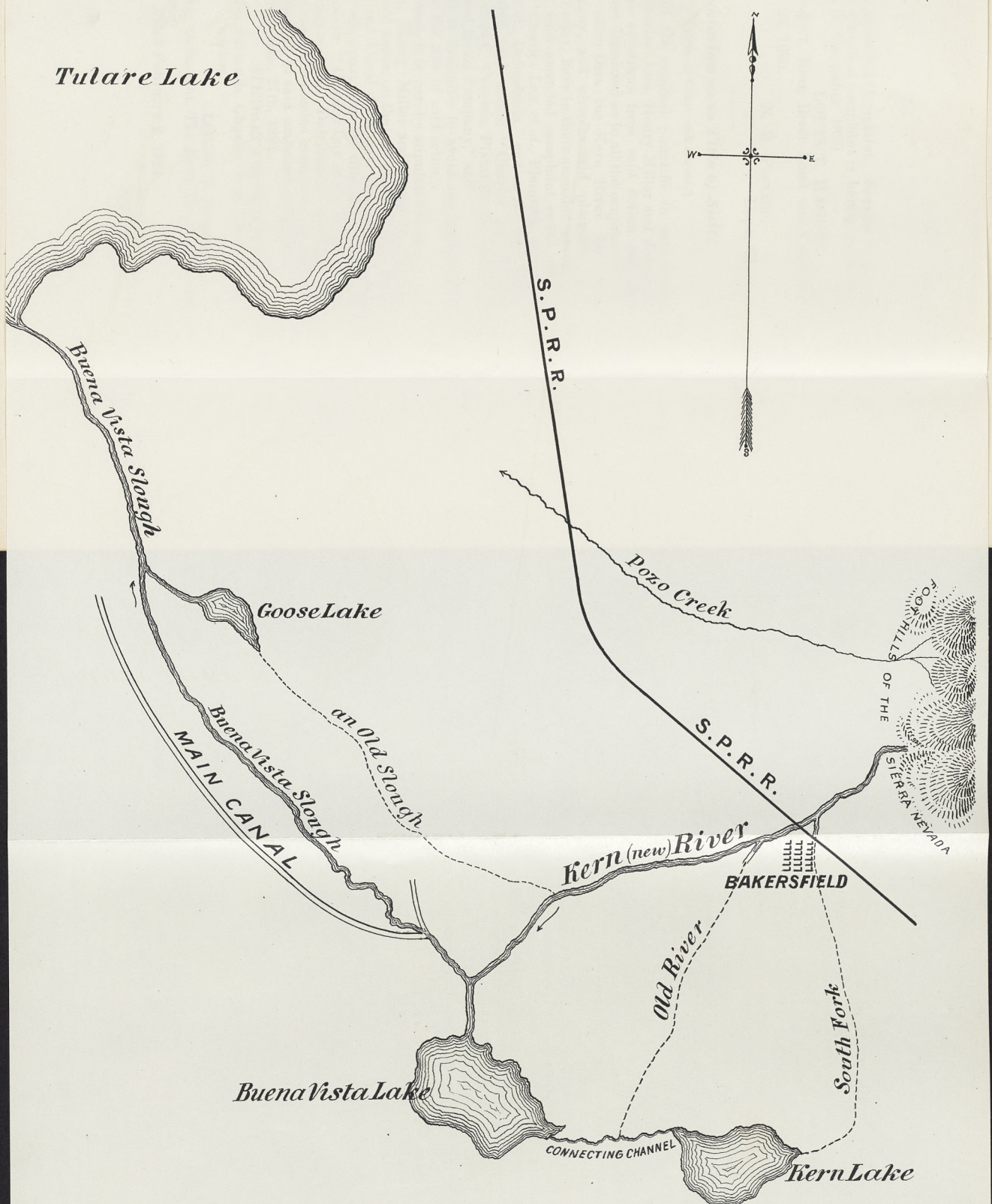
(21); west half of Section Twenty-two (22); all of Section (26); north half, southeast quarter, north half of southwest quarter of Section Twenty-seven (27); northeast quarter, northeast quarter of northwest quarter of Section Twenty-eight (28); northeast quarter of northeast quarter of Section Thirty-four (34); northeast quarter, north half of northwest quarter, southeast quarter of northwest quarter, northeast quarter of southeast quarter of Section Thirty-five (35); all of Section Thirty-six (36).

All of the following land in Township Thirty (30) south, Range Twenty-three (23) east, of the same base and meridian: North half of northeast quarter, southeast quarter of northeast quarter, northeast quarter of northwest quarter of Section One (1).

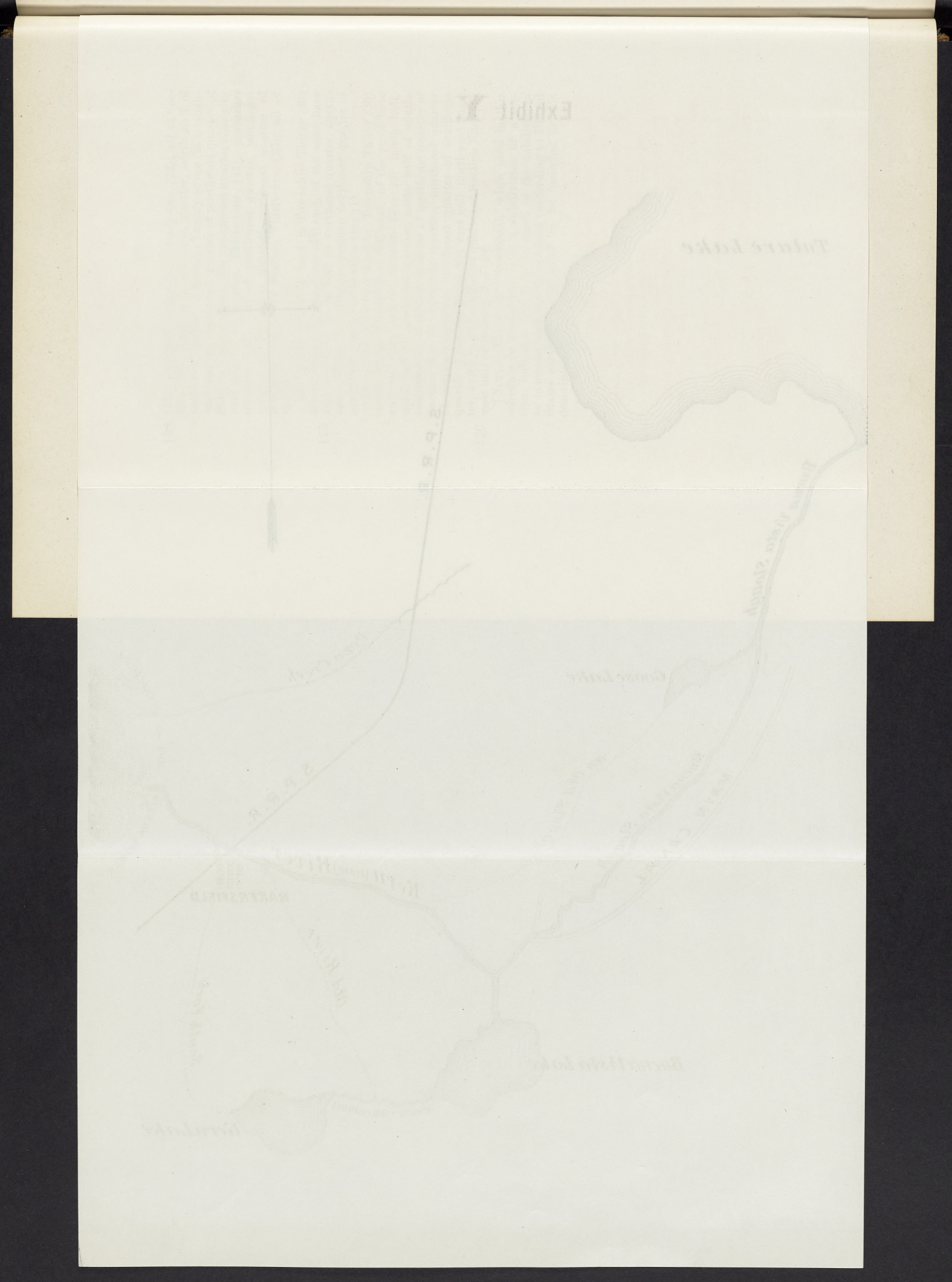
All of the following land in Township Thirty (30) south, Range Twenty-four (24) east, of the same base and meridian: All of Section Five (5); north half, north half of southwest quarter, north half of southeast quarter, southeast quarter of southeast quarter of Section Six (6); northeast quarter, northeast quarter of northwest quarter, northeast quarter of southeast quarter of Section Eight (8); east half, northwest quarter, north half of southwest quarter of Section Nine (9); west half of Section Ten (10).

[NOTE.—The word "fractional," when used in this schedule in connection with a subdivision of a section, indicates that only so much of the subdivision as is swamp and overflowed land (according to United States surveys) is intended to be included in this description].

Exhibit Y.



LITH. BRITTON & REY. S. F.



128 Endorsed: Amended Complaint. Service of a copy of the within amended complaint is hereby admitted, this 21st day of December, 1880.

LOUIS T. HAGGIN,

Att'y for def't, Kern River Land and Canal Co.

Filed Dec. 23, 1880.

N. R. PACKARD,

Dept. Clerk.

Stipulation as to Title of Suit.

[Title of Court and Cause.]

129 Whereas all the original plaintiffs in said action other than Charles Lux, Henry Miller and James C. Crocker, have withdrawn from said action and said action has been dismissed as to all the original defendants therein other than the Kern River Land and Canal Company, and whereas said plaintiffs, Lux, Miller and Crocker, have in their amended complaint, endorsed on said amended complaint as the title of said action; "Charles Lux, *et al.*, Plaintiffs, *vs.* James B. Haggin, *et al.*, Defendants," and on the face thereof have entitled said action "Charles Lux, Henry
130 Miller and James C. Crocker, Plaintiffs, *vs.* The Kern River Land and Canal Company," and

Whereas it is desirable to avoid any ambiguity or uncertainty in the title of said action:

Now therefore, it is hereby stipulated between said Charles Lux, Henry Miller and James C. Crocker plaintiffs in said action on the one part, and The Kern River Land and Canal Company, defendant in said action on the other part, that the title of said action is and shall remain "Charles Lux *et al*, Plaintiffs, *vs.* James B. Haggin, *et al.*, Defendants," and that said title endorsed on said amended complaint, is, and shall
131 be deemed the title in said amended complaint.

San Francisco, Jan. 27th, 1881.

STETSON & HOUGHTON,

Attorneys for Plaintiffs Charles Lux, Henry Miller and James C. Crocker.

LOUIS T. HAGGIN,

Attorney for Defendant, The Kern River Land and Canal Company.

Endorsed: Filed February 2, 1881.

N. R. PACKARD,

Deputy Clerk.



LITH. BRITTON & REY. S. F.

128 Endorsed: Amended Complaint. Service of a copy of the within amended complaint is hereby admitted, this 21st day of December, 1880.

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130 Miller and James C. Crocker, Plaintiffs, *vs.* The Kern River Land and Canal Company," and

Whereas it is desirable to avoid any ambiguity or uncertainty in the title of said action:

Now therefore, it is hereby stipulated between said Charles Lux, Henry Miller and James C. Crocker plaintiffs in said action on the one part, and The Kern River Land and Canal Company, defendant in said action on the other part, that the title of said action is and shall remain "Charles Lux *et al*, Plaintiffs, *vs.* James B. Haggin, *et al.*, Defendants," and that said title endorsed on said amended complaint, is, and shall
131 be deemed the title in said amended complaint.

San Francisco, Jan. 27th, 1881.

STETSON & HOUGHTON,

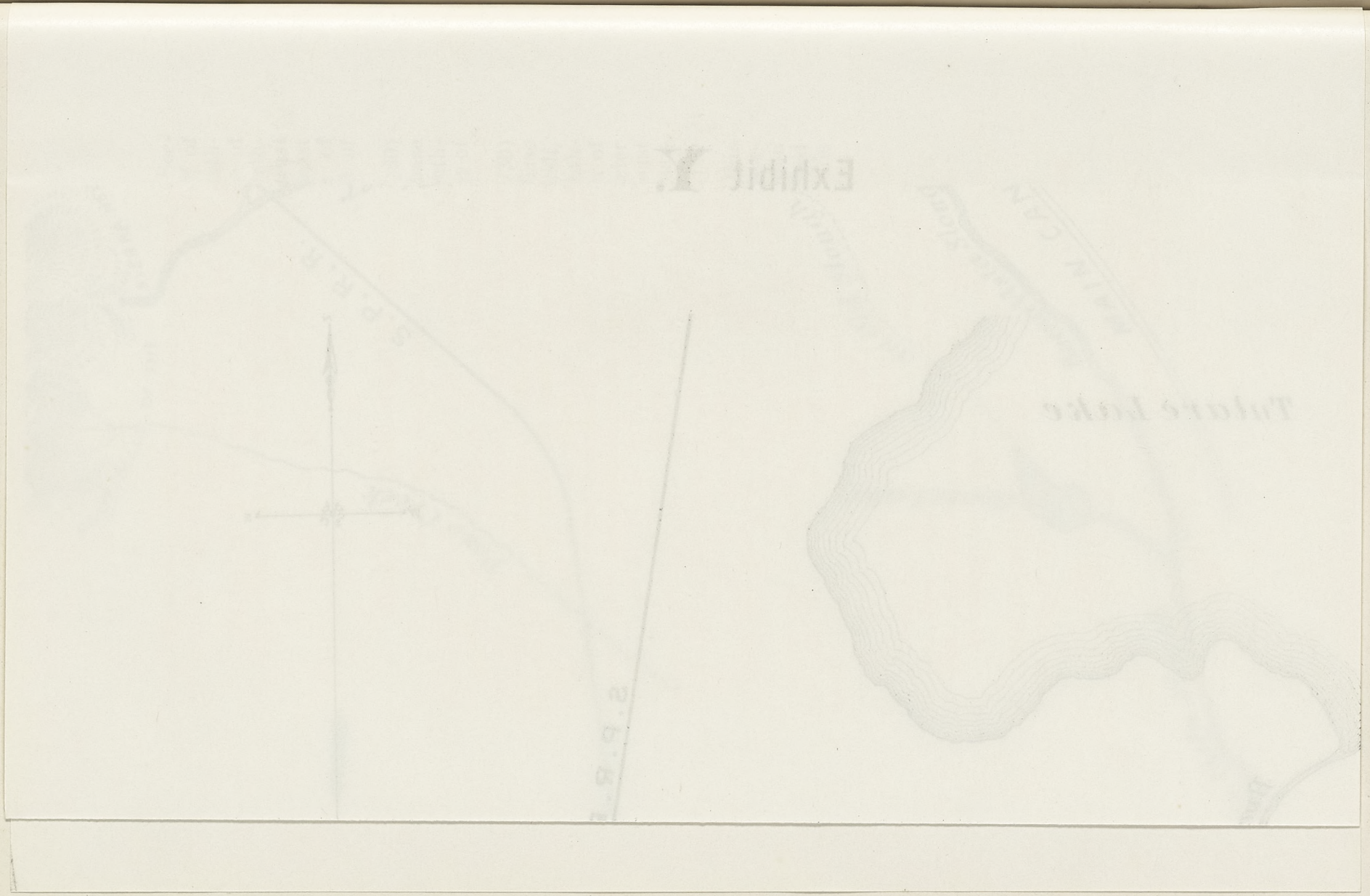
Attorneys for Plaintiffs Charles Lux, Henry Miller and James C. Crocker.

LOUIS T. HAGGIN,

Attorney for Defendant, The Kern River Land and Canal Company.

Endorsed: Filed February 2, 1881.

N. R. PACKARD,
Deputy Clerk.



128 Endorsed: Amended Complaint. Service of a copy of the within amended complaint is hereby admitted, this 21st day of December, 1880.

LOUIS T. HAGGIN,

Att'y for def't, Kern River Land and Canal Co.

Filed Dec. 23, 1880.

N. R. PACKARD,
Dept. Clerk.

Stipulation as to Title of Suit.

[Title of Court and Cause.]

129 Whereas all the original plaintiffs in said action other than Charles Lux, Henry Miller and James C. Crocker, have withdrawn from said action and said action has been dismissed as to all the original defendants therein other than the Kern River Land and Canal Company, and whereas said plaintiffs, Lux, Miller and Crocker, have in their amended complaint, endorsed on said amended complaint as the title of said action; "Charles Lux, *et al.*, Plaintiffs, *vs.* James B. Haggin, *et al.*, Defendants," and on the face thereof have entitled said action "Charles Lux, Henry
130 Miller and James C. Crocker, Plaintiffs, *vs.* The Kern River Land and Canal Company," and

Whereas it is desirable to avoid any ambiguity or uncertainty in the title of said action:

Now therefore, it is hereby stipulated between said Charles Lux, Henry Miller and James C. Crocker plaintiffs in said action on the one part, and The Kern River Land and Canal Company, defendant in said action on the other part, that the title of said action is and shall remain "Charles Lux *et al*, Plaintiffs, *vs.* James B. Haggin, *et al.*, Defendants," and that said title endorsed on said amended complaint, is, and shall
131 be deemed the title in said amended complaint.

San Francisco, Jan. 27th, 1881.

STETSON & HOUGHTON,

Attorneys for Plaintiffs Charles Lux, Henry Miller and James C. Crocker.

LOUIS T. HAGGIN,

Attorney for Defendant, The Kern River Land and Canal Company.

Endorsed: Filed February 2, 1881.

N. R. PACKARD,
Deputy Clerk.

132 ***Demurrer to Amended Complaint.***

[Title of Court and Cause.]

Now comes The Kern River Land and Canal Company, defendant in the above entitled action, by Louis T. Haggin, its attorney, and demurs to the amended complaint of plaintiffs, Charles Lux, Henry Miller and James C. Crocker.

For grounds of demurrer, it specifies:

1st. That said amended complaint does not state
133 facts sufficient to constitute a cause of action.

2d. That in said amended complaint it is alleged (page 1, line 23 et seq.,) that plaintiffs were at the commencement of this action, the owners in fee, seized and possessed of all those certain lands in said amended complaint described, but it nowhere appears that said plaintiffs now own, or at the time of the filing of said amended complaint, did own, said lands, or any part thereof.

3d. That said amended complaint is ambiguous, unintelligible and uncertain, in that it does not set
134 forth how plaintiffs own the lands therein described, whether in severalty or as joint tenants, or as tenants in common or otherwise.

4th. That said amended complaint is ambiguous, unintelligible and uncertain, in that it alleges that in the year 1876, and later, at various times and before the commencement of this action, the lands therein described were granted by the State to plaintiffs or their grantors, but fails to specify which and what portions of said lands were so granted in the year 1876, and what portions thereof were granted thereaf-
135 ter, and also fails to specify the particular and several dates upon which said lands and the several parts thereof were so granted by the State to plaintiffs or their grantors.

5th. That several causes of action have been improperly united in said amended complaint, that is to say: There is a separate and independent and distinct cause of action therein set forth for and on account of the injuries done or apprehended, and the alleged trespasses upon the rights appurtenant to or connected with those lands in said amended complaint described

as lying in townships 25 south, and 26 south, Mount Diable base and meridian, according to the United States surveys, and another separate, independent and distinct cause of action for and on account of the injuries done or apprehended, and the alleged trespasses upon the rights appurtenant to or connected with those lands in said amended complaint described as lying in townships 28 south, 29 south, and 30 south, Mount Diablo base and meridian, according to the United States surveys.

Again, the alleged injuries done or apprehended, and the alleged trespasses upon the rights appurtenant to or connected with the several separate and distinct tracts of land in said amended complaint set forth, are as to each several and separate tract of land, separate and distinct causes of action, and are in said amended complaint improperly united one with the other.

And said defendant specially demurs to that portion of said amended complaint embraced between line 2, page 4, and line 14, page 5 inclusive, [from page 26, folio 102, line 9, to page 27, folio 107, line 2, of this Volume,] in that it fails to set forth facts sufficient to constitute a cause of action; and in this, that the allegations therein contained are ambiguous, unintelligible and uncertain, in that it is not shown that the injuries apprehended or threatened are or will be the necessary result of defendant's alleged actions.

LOUIS T. HAGGIN,
Attorney for the Defendant,
The Kern River Land and Canal Company.
GARBER, THORNTON & BISHOP,
Of Counsel.

Endorsed: Service of the within demurrer by copy admitted this 1st day of February, A.D. 1881.

STETSON & HOUGHTON,
Attorneys for Plaintiffs,
Charles Lux, Henry Miller, and James C. Crocker.
Filed February 2d, 1881.

N. R. PACKARD,
Dep. Clerk.

140 ***Order Overruling Demurrer to Amended Complaint***

REGULAR JANUARY SESSION.

Monday, March 11, 1881.

Court met at 10 o'clock, A.M.

Present, Honorable B. Brundage, Judge.

[Title of Cause.]

The demurrer to plaintiffs' amended complaint in
141 this cause is this day overruled and the defendant is allowed ten days to file answer.

Attest: N. R. PACKARD, Deputy Clerk.

Answers of the Kern River Land and Canal Company, Defendant.

[Title of Court and Cause.]

FIRST ANSWER.

142 Now by Louis T. Haggin, its Attorney, comes "The Kern River Land and Canal Company," the defendant in the above entitled action, and answers plaintiffs' amended complaint as follows:

Defendants admits and alleges that defendant is, and at the commencement of this action and prior thereto, was a corporation created, organized, and existing under and by virtue of the laws of the State of California.

To plaintiffs' allegation that "*plaintiffs were at the commencement of this action the owners in fee, seized and possessed (and for more than a year theretofore they and*
143 *their grantors were such owners) of all those certain lands situate in the County of Kern, in the State of California, and particularly described in a certain schedule which is hereunto*" [i. e. to said complaint] "*annexed, marked 'Schedule M,' and made a part of this complaint,*" defendant, answering, states that it has no information nor belief upon the subject sufficient to enable it to answer said allegation, or any part thereof, and therefore, on that ground it denies:

1st. That plaintiffs, or any of them, are, or is, or at the commencement of this action, or at any time were

144 or was the owners, or owner in fee or otherwise, seized or possessed, or were or was seized or possessed, of all or of any part or portion of the lands in said complaint, or in said "Schedule M." to said complaint annexed, described:

2d. That the grantor or grantors, or any grantor, or grantors of plaintiffs, or of any of them, was or were ever the owner or owners in fee or otherwise, seized or possessed, or was or were seized or possessed, of all, or of any part or portion of said described lands.

Defendant admits, and on its information and belief,
145 alleges that the lands in said complaint described are swamp and overflowed lands, and as such belonged to the State of California until the year 1876, and later.

To plaintiffs' allegation that "*in the year* 1876, *and at various times thereafter, the said lands were granted by the State of California to plaintiffs or their grantors,*" defendant, answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation, and therefore on that ground it denies that in the year 1876, or in any other year, or at various times, or at any time or times the said des-
146 cribed lands or any part or portion thereof, were granted by the State of California to plaintiffs, or to any of them, or to any grantor or grantors of plaintiffs, or of any of them.

On information and belief defendant denies:

1st. That said described lands or any part thereof are situated along or border upon Buena Vista Slough, or on any slough;

2d. That said Buena Vista Slough, or that any
147 slough whereon said lands or any part thereof are situated or border, is or ever was a part of a natural stream or watercourse, known as Kern River, or is or ever was a part of any natural stream or watercourse;

3d. That through said Buena Vista Slough; or that through any slough whereon said lands or any part thereof border or are situated, the waters of said Kern River or any part thereof, or the waters of any river or natural stream or watercourse, or any waters whatsoever flow or always have flowed, or are or have been wont to flow on their way to Tulare Lake or otherwise;

148 4th. That said Kern River now is, or from time immemorial, or ever has been, a natural stream or watercourse, flowing through said Buena Vista Slough, or flowing through any slough whereon said lands or any part thereof border or are situated.

5th. That the waters of said Kern River flow, or always have flowed, or are or have been wont to flow to or towards Tulare Lake.

To plaintiffs' allegation that "*the said Kern River is a natural stream or watercourse rising in the Sierra Nevada and debouching from the mountains into the plains,*
149 *about ten miles easterly from the town of Bakersfield, in said Kern County, whence as far down as a point in Township Twenty-nine* (29) *South, Range Twenty-eight* (28) *East, Mount Diablo base and meridian (according to the United States surveys), it has always, within the memory of man, flowed in the same channel; but that, after reaching said point, the course of the river was anciently, and down to the year* 1862, *along a channel known as the 'South Fork,' which diverged from the present stream to the left or southerly, and, following a course almost due south, emptied into Kern Lake aforesaid at its easterly*
150 *end;*" defendant, answering, states that it has no information nor belief upon the subject sufficient to enable it to answer said allegation or any part thereof, and, therefore on that ground, it denies the same and every part thereof.

On its information and belief, defendant denies that up to the year 1862, or any other time, the waters of said Kern River, or any part or portion thereof, used to run southerly, or otherwise, through said South Fork or otherwise, and thence northerly or otherwise, through Kern Lake, Buena Vista Lake (and the connecting channel between them), or otherwise, and Buena Vista
151 Slough into Tulare Lake, or used to run into Tulare Lake, or into Buena Vista Slough.

To plaintiffs' allegation that "*in the year* 1862, *a flood partially closed said South Fork and opened a new channel, which coincided with the present channel of the river for about three miles below the point aforesaid, and then turned off to the left and followed the course of the slough now known as 'Old River,' and emptied into the connecting channel aforesaid,*" (*i.e.*, the channel between Kern Lake and Buena Vista Lake), defendant answering, states that it has no information nor belief upon the subject sufficient to enable it to answer said allegation

152 or any part thereof, and therefore on that ground it denies the same and every part thereof.

On its information and belief, defendant denies that a part or any of the waters of said Kern River, in the year 1862, or at any other time, or ever flowed through said Old River channel, or otherwise, towards Tulare Lake.

To plaintiffs' allegation that "*in the winter of* 1867–8 *a flood opened the present main channel of the river, which is sometimes known as 'New River,' and which diverges from 'Old River' towards the right or northerly, and joins Buena Vista Slough in or near Section Thirty* (30),
153 *Township Thirty* (30) *South, Range Twenty-five* (25) *East, Mount Diablo base and meridian, according to the United States surveys,*" defendant, answering, states that it has no information nor belief upon the subject sufficient to enable it to answer said allegation, and therefore on that ground it denies the same.

On its information and belief, defendant denies:

1st. That the waters of said Kern River naturally, or otherwise flow, or from time immemorial, or ever, have flowed to or through said Buena Vista Slough;

254 2d. That the waters of said Kern River naturally or otherwise flow, or from time immemorial, or ever, have flowed along, by, through, over, or upon the said or any lands of plaintiffs, or of any of them, or the lands, or any part thereof in said complaint described;

3d. That the waters of said Kern River irrigate, or ever have irrigated, the said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described; or makes, or ever has made said lands, or any part thereof, fit for cultivation or
155 pasture, or supplies or ever has supplied on said lands or any part thereof, water for stock, or for agricultural or domestic purposes, or for all or any purposes for which an owner of lands bordering on a running stream has a right to use the waters thereof, or for any purposes whatsoever, or at all;

4th. That were it not for the diversion, or appropriation, or consumption of the waters of Kern River by defendant, said waters or any part thereof would flow to or through said Buena Vista Slough, or would flow to, along, by, through, over, or upon the said or any lands of plaintiffs, or of any of them, or the lands

156 or any part thereof in said complaint described; or would irrigate said lands or any part thereof, or would make said lands or any part thereof fit for cultivation or pasture, or would supply water thereon or on any part thereof for stock, or for agricultural or domestic purposes, or for all or any purposes for which an owner of lands bordering on a running stream has a right to use the waters thereof, or for any purposes whatsoever, or at all.

To plaintiffs' allegation, that "*none of the changes of the course of the river, hereinbefore*" (*i.e.*, in said complaint) "*mentioned, have affected the supply of water to*
157 *said Buena Vista Slough*," defendant, answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation, and therefore on that ground it denies the same.

On its information and belief, defendant denies:

1st. That the courses, or channels of Kern River and the sloughs and lakes in said complaint mentioned, or any of them, are shown upon the diagram marked "Exhibit Y," annexed to said complaint, and made a part thereof;

158 2d. That said diagram is correct;

3d. That said diagram correctly or approximately or at all represents the said courses or channels of Kern River, or any of them, or the sloughs or lakes in said complaint mentioned, or any of them.

Defendant denies:

1st. That heretofore, to wit: on or about the day of , A.D. 1876, or at any other time the defendant, well knowing or at all knowing the
159 premises in plaintiffs' complaint set forth, or otherwise, or intending to injure plaintiffs or any of them, or the said lands or any part or portion thereof, or any lands whatsoever, or otherwise, wrongfully dug away a part, or any of that bank of the said Kern River at a point above the lands of plaintiffs, or of any of them, or at any point or points whatsoever;

2d. That heretofore, to wit: on or about the day of , A.D. 1876, or at any other time the defendant, intending to injure the plaintiffs, or any of them, or plaintiffs' lands, or any lands of plaintiffs, or

160 of any of them, or the lands in said complaint described, or any part thereof, dug away or removed a part or any of the bank of said Kern River at a point above the lands of plaintiffs, or at any point or points on said river, or constructed a large or any canal or ditch leading away from said river, or otherwise;

3d. That it wrongfully constructed any canal or ditch leading away from said Kern River at any point thereon towards the north, or otherwise;

4th. That it wrongfully consumed or appropriated
161 a portion or any of the waters of said Kern River;

To plaintiffs' allegation that "*heretofore, to wit, on or about the day of , A.D.* 1876, *the defendant dug away and removed a part of the bank of the said Kern River, and constructed a large canal or ditch leading away from said river, and thereby and by other works done and erected, diverted and appropriated a portion of the waters of Kern River, and consumed the same,*" defendant answering, states that it has no information nor belief upon the subject sufficient to enable it to answer said allegation, and therefore, on that ground
162 it denies the same.

Defendant denies, on its information and belief:

1st. That by reason of any digging away or removal of a part or any of the bank of said Kern River at any point whatsoever along said river, it prevented the waters of said river or any part thereof from flowing to, along, by, through, over, or upon the said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described;

2d. That by reason of any canal or ditch by it con-
163 structed, leading away from said Kern River at any point whatsoever along said river, defendant prevented the waters of said river or any part thereof from flowing to, along, by, through, over, or upon the said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described;

3d. That by reason of any diversion, or appropriation, or consumption by it of the waters of the Kern River or any part thereof, said waters or any part thereof were prevented from flowing to, along, by, through, over, or upon the said or any lands of plain-

164 tiffs, or of any of them, or the lands or any part thereof in said complaint described;

4th. That were it not for the diversion, or appropriation, or consumption by it of the waters of Kern River or of any part thereof, the said waters or any part thereof would naturally flow or have flowed to, along, by, through, over or upon the said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described;

5th. That by reason of any works by it done or
165 erected, the waters of said Kern River or any part thereof were at all prevented from flowing to, along, by, through, over or upon the said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described;

6th. That it in any manner whatsoever or at all, hindered or prevented the waters of said Kern River or any part thereof, from flowing, to, along, by, through, over or upon the said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described;

166 7th. That the waters of said Kern River or any part thereof would naturally flow or have flowed to, along, by, through, over or upon the said or any lands of plaintiffs or of any of them, or the lands or any part thereof in said complaint described.

Defendant admits that ever since the day of , A.D. 1876, it has claimed and still claims the right to divert, appropriate and consume a large part or portion, to wit: seventy-four thousand (74,000) inches measured under a four-inch pressure, of the flowing waters of said Kern River. But defendant
167 denies that it claims or ever has claimed the right to divert, appropriate or consume more than said amount of seventy-four thousand (74,000) inches, measured under a four-inch pressure of said waters, or ever has diverted, appropriated or consumed, or now diverts, appropriates or consumes more than said amount of said waters, or has ever wrongfully, or injuriously to plaintiffs, or to any of them, or to the said or any lands of plaintiffs, or of any of them, or to the lands or any part thereof in said complaint described, diverted or appropriated or consumed the waters of said Kern River, or any part thereof.

168 Defendant denies, on its information and belief:

1st. That the lands to irrigate which defendant has diverted and is diverting the water of said Kern River, are not and have not been, within the memory of man, naturally irrigated by the waters of said river;

2d. That the right to the flow of said waters is not naturally incident and appurtenant to the lands to irrigate which defendant has diverted and is diverting the said waters.

169 Defendant avers, on its information and belief:

1st. That the lands, to irrigate which defendant has diverted and is diverting the waters of said Kern River, are and ever have been naturally irrigated by the waters of said river;

2d. That the right to the flow of said waters is and ever has been naturally incident and appurtenant to the lands, to irrigate which defendant has diverted and is diverting the same;

3d. That the right to appropriate and divert the waters of said Kern River for the purpose of irrigating
170 the lands, to irrigate which defendant has diverted and is diverting the said water, is naturally incident and appurtenant to said lands;

To plaintiffs' allegation that "*no water ran through, or into said Buena Vista Slough, nor to, through, by, along, over, or upon plaintiffs' said lands, between July*, 1878, *or thereabouts, and the commencement of this action*," defendant, answering, states that it has no information nor belief upon the subject sufficient to enable it to answer said allegation, and therefore, on that ground it denies the same;

171 Defendant denies, on its information and belief, that by reason of such taking out or diversion or appropriation of the waters of said Kern River by defendant, as in said complaint alleged, or by reason of any taking out or diversion or appropriation of the said water or of any part thereof by defendant, no water ran, or that any water whatsoever was prevented from running through or into said Buena Vista Slough, or to, along, by, through, over, or upon said or any lands of plaintiffs or of any of them, or the land or any part thereof in said complaint described, between July, 1878, or thereabouts, and the commencement of this action, or between any other dates, or at all;

172 Defendant denies on its information and belief, that in consequence of the alleged or any diversion or appropriation of the waters of Kern River, or any part thereof, by defendant, the said Buena Vista Slough, during the period from July, 1878, or thereabouts, to the commencement of this action, or during any other period of time, was, or became dry.

To plaintiffs' allegation that "*between July, 1878, or thereabouts, and the commencement of this action, plaintiffs' said lands were deprived of their natural moisture, and in consequence became dry and deteriorated in value,*" defendant answering, states that it has no information
173 nor belief on the subject sufficient to enable it to answer said allegation, and therefore, on that ground it denies:

1st. That during said period of time, or during any other period of time, or at all, the said or any lands of plaintiffs or of any of them, or the lands or any part thereof in said complaint described, were deprived of their natural moisture, or become dry or deteriorated in value;

Defendant denies on its information and belief, that by reason of any diversion or appropriation by it of
174 the waters of said Kern River or any part thereof, said waters or any part thereof, between July, 1878, or thereabouts, and the commencement of this action, or at any other time, or at all, failed to irrigate or moisten said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described, or failed to supply water thereon or on any part thereof for general or any uses.

Defendant denies on its information and belief, that in consequence of any diversion or appropriation by it of the waters of said Kern River or any part thereof,
175 the said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described, between July, 1878, or thereabouts, and the commencement of this action, or at any other time, or at all, were deprived of their natural moisture, or became dry, or were deteriorated in value.

Defendant denies on its information and belief, that by reason of defendant's continuing or so long as defendant shall continue to divert and appropriate the waters of said Kern River, the said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described, will every year in

176 the future, or at all, be deprived of their natural or any moisture, or be or become dry or deteriorated in value, or be deprived of water for general or any uses, or be prevented from being irrigated or moistened by the water of said Kern River or any part thereof.

To plaintiffs' allegation that "*owing to the nature of the climate and the country, and the slight rain-fall where plaintiffs' said lands are situated, the same, unless irrigated by water flowing from a distance, are unfit for cultivation and pasture, and that there is no natural irrigation of them except by the waters flowing down from the Sierra Nevada through the Kern River, and no means of irriga-*
177 *ting them at all save by the waters of Kern River,*" defendant, answering, states that it has no information nor belief upon the subject sufficient to enable it to answer said allegation or any part thereof, and therefore, on that ground, it denies the same and every part thereof.

To plaintiffs' allegation that "*Plaintiffs' said lands have always (except in seasons of extreme drought and except when prevented by unlawful diversion) been wet and naturally irrigated during the winter and spring,*" defendant, answering, states that it has no information
178 nor belief on the subject sufficient to enable it to answer said allegation, and therefore, on that ground, it denies the same. But, on its information and belief, defendant denies that said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said complaint described, have been wet, or naturally irrigated during the winter or spring, or during any other season of the year, or at all, by the natural flow of the waters of said Kern River, or any part thereof.

To plaintiffs' allegation that "*the waters of said Kern River have caused said lands to be swamp and overflowed land,*" defendant, answering, states that it has no in-
179 formation nor belief on the subject sufficient to enable it to answer said allegation, and therefore, on that ground, it denies the same.

Defendant denies on its information and belief, that it has almost always, or at all, or ever been possible, either with or without artificial irrigation, to cultivate or to raise crops or pasture on the lands, or any part or portion thereof, in said complaint described.

To plaintiffs' allegation that "*the fact that the said lands were designated by the United States Government and the State of California as 'Swamp and Overflowed Lands,' and other facts in said complaint set forth, con-*

180 *stituted the principal inducement to plaintiffs to purchase the said lands,*' defendant, answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation, and therefore on that ground it denies the same.

To plaintiffs' allegation that "*on the faith that said lands would have the benefit of the natural irrigation and overflow, as well as water for other uses, plaintiffs paid large sums of money for the same, and have expended large sums of money in improving the same, and in constructing works for controlling, regulating and utilizing the water naturally supplied to them,*" defendant, answer-
181 ing, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation or any part thereof, and therefore, on that ground it denies the same and every part thereof.

Defendant denies, on its information and belief:

1st. That by reason of the diversion of the waters of Kern River by defendant, the lands, or any part thereof, in said Complaint described, were from the time of such diversion down to the time when this action was commenced, or during any other period of
182 time, or at all, drying up or becoming less fit to produce crops or support cattle.

2d. That said lands, or any part thereof, will continue to dry up or become less fit to produce crops or support cattle, unless defendant be restrained or enjoined from diverting the waters of said Kern River;

To plaintiffs' allegation that "*from the time of the alleged diversion of the waters of Kern River by defendant down to the time when this action was commenced, the said land was continually drying up and becoming less fit to produce crops and support cattle,*" defendant answering,
183 states that it has no informatien nor belief on the subject sufficient to enable it to answer said allegation or any part thereof, and therefore on that ground it denies the same and every part thereof;

To plaintiffs' allegation that "*it has become necessary to pump the water needed for cattle on plaintiffs' said lands,*" defendant answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation and therefore on that ground it denies the same;

Defendant denies, on its information and belief:

184 1st. That in consequence of the alleged or any diversion or appropriation or consumption of the water of Kern River by defendant, it has become, or is necessary to pump water on the said or any lands of plaintiff, or of any of them, or on the lands or any part thereof in said Complaint described.

2d. That it will be necessary in the future to continue to pump, or will be necessary at all to pump water on said lands or on any part thereof, unless defendant be restrained from diverting or appropriating or consuming the waters of said Kern River;

185 To plaintiffs' allegation, that "*the Kern River rises among the highest mountains in the Sierra Nevada, where there is usually in the winter a great accumulation of snow; that the melting of the snow is always liable to cause great and irresistible floods; that the river bed below the foothills is shallow and of insufficient capacity in time of flood to carry off the waters, which then sweep over the adjacent country,*" defendant answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation or any part thereof, and therefore on that ground it denies the same and every part thereof.

186 To plaintiffs' allegation, "*that after the diversion of the waters of Kern River by defendant, willows and other trees and shrubs began to grow up in the bed of Kern River, below the point where the defendant has diverted the said water, and the same are still growing and becoming year by year more serious obstructions to the river channel,*" defendant answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation or any part thereof, and therefore on that ground it denies the same and every part thereof.

187 Defendant denies, on its information and belief:

1st. That by reason of the diversion of the waters of said Kern River, or any part thereof, by defendant, willows or other trees or shrubs began or have begun to grow up, or have grown up in the bed of said Kern River, or are growing up or becoming year by year, or at all, obstructions to the river channel.

2d. That by reason of the diversion, or any diversion of the waters of Kern River or any part thereof, by defendant, there is danger that in times of flood, or

188 at any time, the water may be forced aside from the present channel of the river, or be diverted entirely or at all from said or any lands of plaintiffs, or of any of them, or the lands or any part thereof in said Complaint described, or that said lands, or any part thereof, would, or will be subjected to great or serious detriment, or to any detriment or deterioration whatsoever;

To plaintiffs' allegation, that "*the country along Kern River, below where the South Fork branches off, for many miles on both sides of the river is destitute of hills, and slopes gradually towards the chain of lakes, consisting of Kern Lake, Buena Vista Lake, Goose Lake and Tulare Lake,*
189 *which occupy the lowest depression of the valley between the Sierra Nevada and the Coast Range Mountains,*" defendant answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation or any part thereof, and therefore, on that ground, it denies the same and every part thereof.

Defendant denies on its information and belief, that in said chain of lakes, consisting of Kern Lake, Buena Vista Lake, Goose Lake and Tulare Lake, the general flow of the water is northerly, or that there is any flow of the waters thereof whatsoever;

190 To plaintiffs' allegation that "*Tulare Lake and Goose Lake are lower than Kern Lake and Buena Vista Lake,*" defendant answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation, and therefore, on that ground, it denies the same.

To plaintiffs' allegation, that "*from any point on the Kern River from the mountains down to Buena Vista Slough, a line drawn across the country to Tulare Lake, by way of Goose Lake, would be shorter than the present course taken by the water to reach Tulare Lake; that the*
191 *soil between Kern River (below the foot-hills) and Goose Lake is everywhere light and sandy, and as such would offer little resistence to a current of water; that several large canals have been made on the northerly side of Kern River, leading toward Goose Lake, and connecting with an old slough, which continues on and leads into Goose Lake, which itself connects with Tulare Lake; and if the channel of the river be suffered to become obstructed by trees and shrubs, there is great and serious danger that, in case of a flood in the river, the whole body of its waters may take the shortest course to Goose Lake, and the river bed be permanently shifted, and its waters diverted from*

192 *plaintiffs' said lands,*" defendant answering, states that it has no information nor belief on the subject sufficient to enable it to answer said allegation or any part thereof, and therefore, on that ground, it denies the same and every part thereof.

Defendant denies, on its information and belief, that such change in the course of the Kern River, as by plaintiffs apprehended and in said Complaint set forth, would in any manner affect or depreciate the value of the said or any land of plaintiffs, or of any of them, or the lands or any part thereof in said Com-
193 plaint described.

Defendant denies:

1st. That it is not the owner of land anywhere;

2d. That it is not, and never has been a riparian proprietor on the Kern River, or on any of the waters, sloughs, or channels thereof.

And, on the contrary, defendant alleges that it is the owner of a certain tract of land situated on said Kern River on the northerly bank thereof, in said County of Kern, and described as follows, to wit:

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The north half and south-west quarter of the north-west quarter (N. $\frac{1}{2}$ and S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$) of Section twenty-four (24), Township twenty-nine (29), South, Range twenty-seven (27), East, Mount Diablo Base and Meridian, and that as such owner, and by virtue of its ownership of said described tract of land, defend-and is a riparian proprietor on said Kern River, and as such is entitled to divert, appropriate, use and consume portions of the waters of said river;

Defendant denies, on information and belief, that in consequence of the alleged or any act of defendant,
195 there are, or have been, or will be any injuries to said or any lands of plaintiffs, or of any of them, or to the lands or any part thereof in said complaint described, or that the alleged, or any injuries by defendant occasioned to said lands or any part thereof, are, or will be irreparable, or that the alleged, or any injuries by defendant occasioned to said lands or any part thereof, have caused, or will cause, if suffered to continue or otherwise, the ruin of said lands or any part thereof;

Defendant denies, on its information and belief, that the alleged, or any acts of the defendants are

196 or will be constantly recurring or otherwise, grievances or any grievance whatsoever;

Defendant denies, on its information and belief:

1st. That the alleged injuries, or any injuries by defendant, occasioned or threatened to said or any lands of plaintiffs, or of any of them, or to the lands or any part thereof in said complaint described, or to plaintiffs or to any of them, are or will be such as cannot be compensated by damages;

2d. That for the alleged, or any injuries by defend-
197 ant occasioned or threatened to the said or any lands of the plaintiffs, or of any of them, or to the lands or any part thereof, in said complaint described, or to plaintiffs or to any of them, plaintiffs or any of them have, or will have no plain, speedy or adequate relief at law;

And on the contrary, defendant alleges, on its information and belief—

1st. That the alleged injuries or any injuries by defendant, occasioned or threatened to said or any lands of plaintiffs, or of any of them, or to the lands or any
198 part thereof in said complaint described, or to plaintiffs or to any of them, are and will be such as can be compensated by damages.

2d. That, for the alleged or any injuries by defendant occasioned or threatened to the said or any lands of plaintiffs, or of any of them, or to the lands or any part thereof in said complaint described, or to plaintiffs, or to any of them, plaintiffs and each of them have and will have a full, plain, speedy, and adequate relief at law;

199 Defendant further answering, on its information and belief, denies:

1st. That the lands or any part thereof in said complaint described are, or ever have been riparian lands;

2d. That said lands or any part thereof are or ever have been situated upon, or border, or ever have bordered upon any water-course or natural stream;

3d. That any water-course or natural stream flows, or ever has flowed to, along, by, through over or upon said lands or any part thereof;

200 4th. That said lands or any part thereof, are, or ever have been naturally irrigated by the waters of Kern River, or any part thereof;

5th. That there is or ever has been any right whatsoever to the flow of the waters of Kern River naturally, or otherwise, incident or appurtenant to the said lands, or to any part thereof;

6th. That said lands or any part thereof have, or ever have had or possessed, or ever have possessed, any of the rights, qualities, privileges, incidents, appurtenances or attributes of riparian lands, or of lands
201 bordering on a running stream or natural water-course.

And defendant further answering, on its information and belief, alleges:

1st. That the lands in plaintiffs' complaint described are not and never have been riparian lands, and that no part or portion of said lands is, or ever has been riparian land;

2d. That said lands do not border and never have bordered, and that no part or portion thereof borders
202 or ever has bordered, upon any water-course or natural stream;

3d. That no water-course or natural stream flows, or ever has flowed to, along, by, through, over or upon said lands, or any part or portion thereof;

4th. That said lands are not, and never have been, and no part thereof is, or ever has been naturally irrigated by the waters of Kern River;

5th. That there is not and never has been any right whatsoever. to the flow of the waters of said Kern
203 River or any part thereof, incident or appurtenant to said lands or to any part or portion thereof;

6th. That said lands have not, and never have had, and no part or portion thereof has, or ever has had any of the rights, qualities, privileges, incidents, appurtenances or attributes of riparian lands, or of lands bordering on a running stream or natural water-course.

Defendant further answering, on its information and belief, denies:

1st. That plaintiffs or any of them are riparian proprietors or owners, or that any one of them is a riparian

proprietor or owner of any lands whatsoever on, or bordering upon Kern River, or any of the branches, sloughs, or channels thereof;

2d. That by virtue of the ownership or possession, or occupation of the lands in said complaint described, or any part or portion thereof, plaintiffs or any of them are, or ever have been riparian proprietors or owners, or that any one of them is, or ever has been a riparian proprietor or owner, or that plaintiffs or any of them are, or is, or ever have, or has been entitled to have the waters of Kern River, or any part thereof, flow to, along, by, through, or upon the said lands, or any part or portion thereof;

3d. That by virtue of the ownership or possession or occupation of the lands, or any part thereof, in said complaint described, or of any lands, or for any reason, or in any manner whatsoever, plaintiffs, or any of them have, or ever have had, or that any one of them has, or ever has had the right to take out, divert, appropriate or use the waters of said Kern River, or any part thereof, for any purpose or purposes whatsoever.

SECOND ANSWER.

For a second, further, separate and distinct answer to plaintiffs' amended complaint:

Defendant denies, on its information and belief:

1st. That the waters of Kern River or any part thereof, flow or have flowed, or are or ever have been wont to flow to, along, by, through, over or upon the lands, or any part thereof in said complaint described;

2d. That plaintiffs or any of them are entitled to have the waters of said river, or any part thereof, flow to, along, by, through, over or upon said lands or any part thereof;

3d. That said lands or any part thereof are, or ever have been riparian lands, or lands bordering or situated upon a running stream or natural watercourse.

Defendant denies that it has wrongfully diverted, appropriated or consumed a part or any of the waters of said river;

Defendant denies that it has in any manner whatsoever

208 injured plaintiffs, or any of them, or the said lands or any part thereof.

Defendant denies that it has not the right, and is not entitled to take out, divert, appropriate, use and consume portions of the waters of said river, or that it has taken out, diverted, appropriated, used or consumed more of the waters of said river than it was by right entitled to.

Defendant alleges, on its information and belief, that by virtue of a compliance by itself, its predecessors in interest and grantors, with the general and local customs well established and recognized as part
209 and portion of the Common Law of the United States, and of this State, in the matter of and relative to the appropriation, diversion and use of water and acquisition of water rights within this State of California, as well as with the Statute laws of the United States and of the State of California, on such subject made and provided, defendant has appropriated, acquired and become entitled to, and now is entitled to, and of right may take out, appropriate, divert, use and consume a large part or portion, to wit: seventy-four thousand (74,000) inches measured under a four-inch pressure
210 of the flowing waters of said Kern River.

THIRD ANSWER.

For a third, further, separate and distinct answer to plaintiffs' amended complaint:

Defendant denies—

1st. That it has wrongfully diverted, appropriated or consumed a part or any of the waters of the Kern River, in said complaint mentioned;

211 2d. That it has in any manner whatsoever injured plaintiffs, or any of them, or the lands, or any part thereof, in said complaint described;

3d. That it has not the right, and is not entitled to take out, divert, appropriate, use and consume portions of the waters of said river;

4th. That it has taken out, diverted, appropriated, used or consumed of said waters more than that part thereof to which it was entitled.

On its information and belief, defendant alleges:

212 That heretofore, to wit: on or about the 4th day of May, A.D. 1875, defendant's grantors, acting in the full faith and *bona fide* belief that a large portion, to wit: more than seventy-four thousand (74,000) inches, measured under a four-inch pressure of the waters of said Kern River, were unused, vacant, unappropriated and free and open to appropriation and use, posted a certain notice of appropriation of water on the north bank of said river, in Kern County, State of California, at a point on or about the southwest quarter of Section Thirteen (13) in Township Twenty-nine (29) South, Range Twenty-seven (27) East, Mount Diablo base and
213 meridian, according to the United States surveys, wherein they claimed and whereby they notified plaintiffs, plaintiffs' grantors, and all persons whomsoever it might concern, that they claimed and appropriated and proposed and intended to take out and divert, use and consume a large part and portion, to wit: seventy-four thousand (74,000) inches, measured under a four-inch pressure, of the flowing waters of said Kern River, for the purpose of irrigating certain lands in said notice described, and of supplying water thereunto and thereon, for other purposes in said notice set forth; That within ten days after the posting of said notice,
214 to wit: on the 4th day of May, A.D. 1875, the said notice was duly recorded in the office of the County Recorder of said Kern County, in Book 1 of Water Rights, page 37, to which said record reference is here made, and which said record is made a part hereof; That defendant's said grantors thereby appropriated and acquired the said amount of the flowing waters of said Kern River, with the right to take out, divert, use and consume the same for the uses and purposes in said notice mentioned, all of which said appropriations, rights and properties they (defendant's said grantors)
215 on, to wit: the 18th day of May, A.D. 1875, granted, bargained and sold, transferred, assigned and conveyed to this defendant; That within twenty days after the posting of said notice, as aforesaid, to wit: on or about the day of May, A.D. 1875, defendant, for the purpose of utilizing said waters of Kern River in the manner and at the places in said notice mentioned, commenced the construction of that certain ditch or canal known as the Calloway Canal, and being the same as in said complaint described, and thereafter and thenceforth defendant continuously and diligently prosecuted the work on said canal until the same was

216 completed, and expended thereon and in the construction thereof large and vast sums of money, amounting in the aggregate to to wit: ninety thousand ($90,000) dollars; That during the construction of said canal, defendant diverted and used the aforesaid amount of water in irrigating and fertilizing the lands in said notice described, and for stock and other beneficial purposes on said described lands, and defendant has continued so to use said amount of water through said canal from and after the completion thereof; That for more than ten years prior to and next preceding the posting of said notice and the appropriation and claim
217 of said waters by defendant's said grantors, all and every part of those certain lands in said complaint described, were lying entirely waste, uncultivated and unoccupied, and no water whatsoever from the said Kern River was used thereon for any useful or beneficial purpose, or for any purpose whatsoever, and defendant's said grantors and defendant, knowing said facts, verily believed that no water whatsoever was claimed for or on said lands or any part thereof, by plaintiffs or any of them, or by plaintiffs' grantor or grantors, or by the grantor or grantors of any of the plaintiffs, or by any person or persons whatsoever; That neither
218 defendant nor defendant's said grantors, or any of them, knew or had any means of knowing that plaintiffs or any of them, or the grantor or grantors of plaintiffs or any of them, had or claimed any rights whatsoever in or to the waters of said Kern River or any part thereof; That divers and various other parties, strangers to this suit, seeing and knowing that this defendant was constructing the said canal, and had diverted and appropriated, and was diverting and appropriating the said waters of Kern River for the purpose of supplying and distributing the same to the lands in
219 said notice described, and seeing and knowing that, from time immemorial, no water from said river had been used and that none was being used, upon the lands or any part thereof in said complaint described, and verily believing that neither plaintiffs, nor any of them, nor plaintiffs' grantor or grantors, nor the grantor or grantors of any of the plaintiffs, claimed or asserted any rights whatsoever to the waters of said river or any part thereof, or contemplated or proposed using said waters or any part thereof, and verily believing that this defendant had acquired and possessed a valid and vested right to the said amount of the flowing waters

220 of said Kern River, and abiding in the faith and belief that the lands and every part thereof in said notice described would ever be supplied with water from said Kern River, for irrigating and other purposes, by this defendant, through its said canal [which said faith and belief were induced and confirmed by the silence of plaintiffs, and each of them, and of plaintiffs' grantor and grantors, and the grantor and grantors of each of the plaintiffs, in making any demand for, or asserting any claim to the said waters of Kern River, or any part thereof] entered upon and purchased from the Government of the United States, and from other par-
221 ties, large and vast tracts of land bordering upon, or along the course of said Calloway Canal [and being within and forming a part of that larger tract of land in said notice described, knowing that with the certainty of having and receiving water thereon from said canal, for irrigating, stock and domestic purposes, the same were, and ever would be, of great and constantly increasing value] and expended therefor and thereon, in improving the same, large sums of money, amounting in the aggregate to, to wit: more than two millions of dollars, none of which said lands would they have
222 purchased, and none of said sums of money would they have expended were it not for their said knowledge, faith and belief above set forth, they well knowing that all of said lands in said notice described were, and ever would be, utterly and absolutely worthless if deprived of the water from said Kern River through said canal; That said third parties so believing that this defendant had, and would ever have the right to appropriate and divert, through its said canal, the aforesaid amount of water from said Kern River, and that their, and each of their said tracts of land so purchased and improved would ever be, and have the
223 right to be supplied by this defendant through its said canal with water from said Kern River, for irrigation and for other purposes, made and entered into certain and sundry contracts with this defendant, whereby this defendant bound and obligated itself to furnish and supply to the said parties upon their said several tracts of land, water for irrigating the same, and for stock and domestic purposes; That defendant would not have made nor entered into said contracts, or any of them, were it not for its reliance, faith and belief, based upon the facts hereinbefore recited, that it had the right to take out, appropriate, divert, use and consume

224 for the purposes in said notices specified, the aforesaid amount of the flowing waters of said Kern River; That plaintiffs, and each of them, and plaintiffs' grantors, and each of them, well knowing the facts herein alleged, and also knowing that defendant was, in the construction of said canal, entering upon and undertaking a vast and extensive work, which would necessitate large and constant outlays and expenditures of money, and knowing further, that defendant was actually expending in the construction of said canal large and vast sums of money, and that during the construction of said canal de-
225 fendant was taking out and diverting, and when said canal should be completed defendant would continue to take out and divert through the same a large portion, to wit: the amount hereinabove stated of the flowing waters of the said Kern River, and also knowing when the said canal was completed that defendant did take out and divert, appropriate, use and consume, and from the time of its completion to the commencement of this action continued to take out and divert, appropriate, use and consume through the said canal the aforesaid amount of the flowing waters of said Kern River, and further, knowing that defendant and de-
226 fendant's grantors were, each and all of them, ~~ignorant~~ ignorant that plaintiffs or any of them, or plaintiffs' grantor or grantors, or any of them or the grantor or grantors of any of the plaintiffs, had or claimed any right whatsoever in or to the waters of said Kern River, or any part thereof, and further knowing that defendant would not have undertaken the construction of said canal, nor have purchased the same, nor have expended said or any sums of money thereon, nor have made or entered into the aforesaid contracts, or any of them, were it not for the reliance and belief
227 which defendant had that defendant was lawfully entitled to the said amount of the flowing waters of said Kern River, with the right to take out, divert, appropriate, use and consume the same through the said canal; yet, and notwithstanding, plaintiffs, and each of them, and each of their grantors, and each of the grantors of any of the plaintiffs, stood by and saw, acquiesced in, consented to, and impliedly approved the appropriation of said waters by defendant and defendant's grantors, and the work that was done, and was being done by defendant in the matter of the construction of said canal, and the preparations defendant

was making for and with the well-known and avowed intention of diverting, appropriating, using and consuming the waters of said river to the amount above mentioned, but made no objection or opposition to the same, nor did they, or any of them notify or intimate to defendant, or to defendant's grantors, that they or any of them had or claimed any right whatsoever in or to the waters of said Kern River or any part thereof; and by their acts, their silence and their failure to assert or make known any rights which they, or any of them, had in or to the said waters or any part thereof, plaintiffs and their grantors encouraged and confirmed defendant in its belief that they neither had nor claimed, and that none of them had or claimed any interest in or right to the waters of Kern River or any part thereof; and plaintiffs, and each of them, are now estopped and precluded from asserting any rights which they or any of them have or may have in or to the waters of said Kern River, or any part thereof, adverse to this defendant; and if plaintiffs or any of them, after having tacitly approved and consented to the said acts of defendant and defendant's said grantors hereinabove recited, be now permitted to assert or maintain any right, claim or interest whatsoever in or to the waters of said Kern River as against this defendant, the aforesaid acts and conduct of plaintiffs will be a fraud upon the rights of this defendant, and defendant will be thereby greatly and irreparably injured.

FOURTH ANSWER.

For a fourth, further, separate and distinct answer to plaintiffs' amended complaint:

Defendant denies—

1st. That it has wrongfully taken out or diverted, appropriated, used or consumed a part or any of the waters of the Kern River in said complaint mentioned;

2d. That it has in any manner injured plaintiffs, or any of them, or the lands or any part thereof in said complaint described.

On its information and belief defendant alleges:

That at various points on said river (all above the lands and every part thereof in said complaint de-

scribed), heading thereon and leading therefrom, are several large canals, owned by various and diverse parties, strangers to this suit; That amongst said canals and canal owners are the following, to-wit: the Beardsley Canal, owned by the Kern River Water and Irrigating Company; the Kern Island Irrigating Canal, owned by the Kern Island Irrigating Canal Company; the Farmers' Canal, owned by the Farmers' Canal Company; the Stine Canal, owned by the Stine Canal Company; the Anderson Canal, owned by the Anderson Canal Company; the Gates Canal, owned by the Gates Canal Company; the Buena Vista Canal, owned by the Buena Vista Canal Company; the James Canal, owned by the James Canal Company; the Plunkett Canal, owned by the Plunkett Canal Company; the Meacham Canal, owned by the Meacham Irrigation Canal Company; the Goose Lake Canal, owned by the Goose Lake Canal Company; the Pioneer Canal, owned by the Pioneer Canal Company; the James and Dixon Canal, owned by the James and Dixon Canal Company; the Joyce Canal, owned by the Joyce Canal Company; the South Fork or Panama Canal, owned by the South Fork Canal Company, and the Johnson Canal, owned by the Johnson Canal Company; That all of said above named canal companies, except the South Fork Canal Company and the Johnson Canal Company, are corporations duly organized and existing under and by virtue of the laws of the State of California; That more than five years next preceding the several times when, as in said complaint alleged, defendant did divert or take out water from said river, and more than five years next preceding the commencement of this action said canal owners had, by virtue of a compliance by themselves, their respective predecessors in interest and grantors with the general and local customs and usages, laws and regulations (as well those of the United States as those of the State of California), in the matter of and relative to the appropriation, diversion, use and consumption of water and the acquisition of water rights within this State, acquired the right to take out, divert, appropriate, use and consume for irrigation and other beneficial uses, each through its said and respective canal, a large part and portion of the flowing waters of said river; That at, and for more than five years next preceding all the said several times when, as in said complaint alleged, defendant took out or diverted water from said river,

and at and for more than five years next preceding the commencement of this action, said canal owners, under claim of right, did and now do openly, notoriously, continuously, exclusively and adversely to plaintiffs and to all the world, take out and divert, appropriate, use and consume for irrigation and other beneficial uses, each through its said and respective canal, a large portion of the flowing waters of said river, so by it respectively acquired, ever and at all said times having and claiming the right so to do by virtue of the compliance with the general and local customs, usages, laws and regulations aforesaid; that the waters so taken out and diverted by said canal owners are and ever have been used and consumed in irrigation and other beneficial uses, and never again returned to the channel of said river; that after supplying to the said canals the said amounts of flowing water to which said canal owners are and during all the times herein mentioned have been entitled and accustomed to have and receive, and of right ought to have and receive from said river, there is not, and, except in times of sudden floods and freshets never has been sufficient water left or remaining in said river, to, in its natural flow, flow down to or reach the lands or any part thereof in said complaint described; that of the surplus waters of said river, over and above the said amounts to which, as aforesaid, the said canal owners are, and during all the times herein mentioned have been entitled and accustomed to receive from said river in said canals, the amount by defendant taken out or diverted is not, and never has been sufficient to, if left to itself, in its natural flow, flow down to, or reach the lands, or any part thereof, in said complaint described.

FIFTH ANSWER.

For a fifth, further, separate and distinct answer to plaintiffs' amended complaint:

Defendant denies—

1st. That it has wrongfully taken out or diverted, appropriated, used or consumed a part or any of the waters of the Kern River in said complaint mentioned;

2d. That it has in any manner injured plaintiffs, or any of them, or the lands or any part thereof, in said complaint described.

240 On its information and belief, defendant alleges:

That at various points on said river (all above the lands and every part thereof in said complaint described), heading thereon and leading therefrom, are several large canals, owned by various and diverse parties, strangers to this suit: That amongst said canals and canal owners are the following, to wit: the Beardsley Canal, owned by the Kern River Water and Irrigating Company; the Kern Island Irrigating Canal, owned by the Kern Island Irrigating Canal Company; the Farmer's Canal, owned by the Farmers' Canal
241 Company; the Stine Canal, owned by the Stine Canal Company; the Anderson Canal, owned by the Anderson Canal Company; the Gates Canal, owned by the Gates Canal Company; the Buena Vista Canal, owned by the Buena Vista Canal Company; the James Canal, owned by the James Canal Company; the Plunkett Canal, owned by the Plunkett Canal Company; the Meacham Canal, owned by the Meacham Irrigation Canal Company; the Goose Lake Canal, owned by the Goose Lake Canal Company; the Pioneer Canal, owned by the Pioneer Canal Company; the James and Dixon Canal, owned by the James and Dixon
242 Canal Company; the Joyce Canal, owned by the Joyce Canal Company; the South Fork or Panama Canal, owned by the South Fork Canal Company, and the Johnson Canal, owned by the Johnson Canal Company; That all of said above named canal companies except the South Fork Canal Company and the Johnson Canal Company are corporations duly organized and existing under and by virtue of the laws of the State of California; That more than five years next preceding the several times when, as in said complaint alleged, defendant did divert or take out water from
243 said river, and more than five years next preceding the commencement of this action said Canal owners had, by virtue of a compliance by themselves, their respective predecessors in interest and grantors with the general and local customs and usages, laws and regulations (as well those of the United States, as those of the State of California), in the matter of, and relative to the appropriation, diversion, use and consumption of water and the acquisition of water-rights within this State, acquired the right to take out, divert, appropriate, use and consume for irrigation and other beneficial uses, each through its said and respective canal, a large

part and portion of the flowing waters of said river; That at, and for more than five years next preceding, all the said several times when, as in said complaint alleged, defendant took out or diverted water from said river, and at and for more than five years next preceding the commencement of this action, said canal owners, under claim of right, did and now do openly, notoriously, continuously, exclusively and adversely to plaintiffs and to all the world, take out, and divert, appropriate, use and consume for irrigation and other beneficial uses, each through its said and respective canal, a large portion of the flowing waters of said river, so by it respectively acquired ever and at all said times having and claiming the right so to do by virtue of the compliance with the general and local customs, usages, laws and regulations aforesaid; that the waters so taken out and diverted by said canal owners are, and ever have been used and consumed in irrigation and other beneficial uses and never again returned to the channel of said river; That after supplying to the said canals the said amounts of flowing water to which said canal owners are and during all the times herein mentioned have been entitled and accustomed to have and receive, and of right ought to have and receive from said river, there is not, and except in times of sudden floods and freshets, never has been sufficient water left or remaining in said river to, in its natural flow, flow down to, or reach the lands or any part thereof, in said complaint described; That of the surplus waters of said river, over and above the said amounts to which, as aforesaid, the said canal owners are, and during all the times herein mentioned have been entitled and accustomed to receive from said river in said canals, the amount by defendant taken out or diverted is not, and never has been sufficient to, if left to itself in its natural flow, flow down to, or reach the lands or any part thereof, in said complaint described; That at and during all the times when, as in said complaint alleged, defendant took out or diverted water from said river, the water so taken out or diverted by defendant was, by defendant, taken out and diverted, appropriated, used and consumed with the knowledge permission and consent, license and approval of said canal owners so having the right and being entitled thereunto; That had defendant refrained, ceased or abstained from taking out and diverting said waters, the same would have flowed to and into the said canals

248 of said canal owners, and have been by them appropriated, used and consumed, and thereby diverted from said river, and prevented from flowing to, or upon, by, through, or over the lands. or any part thereof, in said complaint described: That had defendant abstained from taking out, or diverting said water, the same would never have flowed down to, or have reached the said lands, or any part thereof.

SIXTH ANSWER.

249 For a sixth, further, separate and distinct answer to plaintiffs' amended complaint:

Defendant denies:

1st. That it has wrongfully diverted or taken out a part of any of the waters of the Kern River, in said complaint mentioned;

2d. That it has not the right to divert and carry off the waters of said river;

3d. That it has in any manner injured plaintiffs, or any of them, or the lands or any part thereof, in said
250 complaint described.

Defendant, admitting that at a point on or about the southwest quarter of Section thirteen (13) in Township twenty-nine (29) south, Range Twenty-seven (27) east, Mount Diablo base and meridian, according to the United States surveys, it takes out of, and diverts from the said Kern River a portion of the surplus waters thereof, on its information and belief, alleges:

That below said point where defendant so takes out and diverts said waters, there are, and from time im-
251 memorial have been, large tracts of swamp and overflowed lands, whereon, in times of freshets and unusual floods, the said river has, from time immemorial, been wont to discharge its surplus waters, thereby inundating and submerging said lands and rendering them unfit for cultivation, and useless for any purpose whatsoever, besides causing thereon the formation of pools and ponds of standing water, which, during the long and dry summers common to that section of country, became foul and stagnant and injurious to the health of both man and beast; that said lands are, and would be fertile, productive, and of great value, if re-

claimed from their swamp and overflowed condition; that said lands are owned by sundry and diverse parties, some of whom are stockholders in the Kern River Land and Canal Company, this defendant; that owing to the nature and the general topography of the surrounding country, the said lands can be thoroughly and effectually reclaimed by preventing the surplus waters of said river from flowing down to, over and upon the same; that the only practicable or possible way by which such reclamation can be effected is, by tapping said river at some point high up the same, and diverting therefrom and carrying off its surplus waters before they can flow to or reach said lands; that for the purpose of so reclaiming said lands from inundation and overflow and thereby rendering them fit for cultivation and valuable for other purposes, defendant, for and at the request of the owners of said lands, has, at great cost and expense to itself, constructed its said Calloway Canal, leading from said river at a point high up the same, to wit: at the point hereinabove mentioned, and has thereby tapped the said river and opened up a drain or outlet through which a large portion of its surplus waters are and can be permanently diverted and carried off and prevented from flowing down to, and upon the said lands; that by so doing, defendant has in fact prevented a large portion of the said waters from reaching said lands, and has thereby benefited and improved, and to a great extent reclaimed the same; that if defendant be permitted to continue so diverting and carrying off said waters, defendant will, within a short time, have totally, permanently and effectually reclaimed the said lands from inundation and overflow, and have prevented the accumulation of foul and stagnant water thereon, and thereby have rendered said lands healthful and habitable and fit for cultivation, pasture and other useful purposes; that if defendant be now stopped or prohibited from continuing its said work of reclamation, within a short time hence, all the benefit it has conferred upon said lands, and all improvements it has thereunto wrought, will be lost and destroyed, and the said lands will be restored to and again resume their swamp and overflowed condition, useless and worthless to man, and pestilent and unwholesome to the surrounding country.

256 SEVENTH ANSWER.

For a seventh, further, separate and distinct answer to plaintiffs' amended complaint:

Defendant alleges that the cause of action set forth in said complaint did not accrue within five years next before the commencement of this action, and that the same is barred by the provisions of Section 318 of the Code of Civil Procedure of this State.

EIGHTH ANSWER.

257 For an eighth, further, separate and distinct answer to plaintiffs' amended complaint:

Defendant alleges that the cause of action set forth in said complaint did not accrue within five years next before the commencement of this action, and that the same is barred by the provisions of Section 319 of the Code of Civil Procedure of this State.

NINTH ANSWER.

For a ninth, further, separate and distinct answer to plaintiffs' amended complaint:

258 Defendant alleges that the cause of action set forth in said complaint did not accrue within three years next before the commencement of this action, and that the same is barred by the provisions of Sections 335 and 338 of the Code of Civil Procedure of this State.

TENTH ANSWER.

For a tenth, further, separate and distinct answer to plaintiffs' amended complaint:

Defendant alleges that the cause of action set forth
259 in said complaint did not accrue within four years next before the commencement of this action, and that the same is barred by the provisions of Sections 335 and 343 of the Code of Civil Procedure of this State.

And defendant submits to this Honorable Court that, all and every, the matters in the said complaint mentioned and complained of, are matters which can and may be tried and determined at law, and with respect to which the plaintiffs are not, nor is any of them, entitled to any relief from a Court of Equity, and defendant prays that it shall have the same benefit of this defense as if it had demurred to the said complaint.

260 Wherefore, defendant prays to be hence dismissed, and for its costs of suit.

LOUIS T. HAGGIN,
Attorney for Defendant.

GARBER, THORNTON & BISHOP, AND
FLOURNOY & MHOON,
Of Counsel for Defendant.

STATE OF CALIFORNIA, } ss.
City and County of San Francisco, }

J. K. Goodrich, being first duly sworn, says: That he has read the foregoing answers and knows the con-
261 tents thereof, and that the same are true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes them to be true; that the Kern River Land and Canal Company the defendant in said action, named in said answers, is a corporation, and that he is an officer and the Secretary of said corporation and therefore, for that reason, he makes this verification for and on behalf of said Kern River Land and Canal Company, defendant.

J. K. GOODRICH,

262 Subscribed and sworn to before me, this 25th day of March, A.D. 1881.

[SEAL.]

HOLLAND SMITH,
Notary Public.

Endorsed: Service of the foregoing answers of the Kern River Land and Canal Company defendant, by copy admitted this 25th day of March, A.D. 1881.

STETSON & HOUGHTON,
Attorneys for Plaintiffs.

Filed March 28, 1881.

N. R. PACKARD,
Deputy Clerk.

263

Notice of Motion for Order Striking Out Parts of Answer and Order Shortening Time.

[Title of Court and Cause.]

To Louis T. Haggin, Esq., Attorney for defendant, The Kern River Land and Canal Company:

You will please take notice that on Monday, the eleventh day of April. A.D. 1881, at the hour of ten o'clock A.M., or as soon thereafter as counsel can be

264 heard, we shall move the above entitled Court at the Court-room thereof, in the town of Bakersfield, County of Kern, State of California, for an order striking out the following portions of the answer of the defendant, The Kern River Land and Canal Company, to the amended complaint herein, and on the following grounds:

1. All from the word "defendant," line 2 page 12, down to and including the word "to," line 17 page 12, on the ground that the same is redundant.

2. All from the word "defendant," line 18 page 12,
265 down to and including the word "River," line 26 same page, on the ground that the same is sham, irrelevant and redundant.

3. All from the word "defendant," line 28 page 12, down to and including the word "entitled," line 2 page 13, on the ground that the same is redundant.

4. All from the word "on," line 3, page 13, down to and including the word "thereof," line 37, page 13, on the ground that the same is sham, irrelevant and redundant.

266 5. All from the word "that," line 37, page 13, down to and including the word "injured," line 38, page 15, on the ground that the same is sham, irrelevant and redundant.

6. All from the word "defendant," line 2, page 16, down to and including the word "described," line 6, page 16, on the ground that the same is redundant.

7. All from the word "on," line 7, page 16, down to and including the word "described," line 13, page 17, on the ground that the same is sham, irrelevant
267 and redundant.

8. All from the word "defendant," line 15, page 17, down to and including the word "described," line 19, page 17, on the ground that the same is redundant.

9. All from the word "on," line 20, page 17, down to and including the word "thereof," line 37, page 18, on the ground that the same is sham, irrelevant and redundant.

10. All from the word "defendant," line 38, page 18, down to and including the word "described," line 3, page 20, on the ground that the same is redundant.

268 11. All from the word "defendant," line 4, page 20, down to and including the word "country," line 43, page 20, on the ground that the same is sham, irrelevant and redundant.

Said motion will be made on the amended complaint and the answer thereto on file herein.

STETSON & HOUGHTON,
Att'ys for Pl'ff.

Upon reading the affidavit of R. E. Houghton, and good cause appearing therefor, it is hereby ordered that the hearing on the above notice be fixed for Monday, the
269 eleventh day of April, 1881, at 10 o'clock A. M., and that plaintiffs' attorneys give to the attorney for defendant notice of the hearing on said motion at least five days before said eleventh day of April, 1881.

Dated Bakersfield, April 4, 1881.

B. BRUNDAGE,
Judge of the Superior Court.

Service of a copy of the within notice of motion and order is hereby admitted this 4th day of April, 1881.

LOUIS T. HAGGIN,
Att'y for Def't, Kern River Land and Canal Co.

270 Endorsed: Filed April 4, 1881,

N. R. PACKARD,
Dep. Clerk.

Order Denying Motion to Strike Out Parts of Answer.

[Title of Court and Cause.]

This cause came on to be heard on the motion to strike out portions of the answer; the same is argued, and overruled by the Court. Plaintiff excepts.

And the Court took a recess.

271 Attest: N. R. PACKARD, Deputy Clerk.

Monday, April 11th, 1881.

Bill of Exceptions on Order Denying Motion to Strike Out Parts of Answer.

[Title of Court and Cause.]

Be it remembered, that on the 4th day of April, A. D. 1881, the plaintiffs, by Stetson & Houghton, their attorneys, gave notice of a motion, for the 11th day of April, A.D. 1881, for an order striking out certain portions of defendant, The Kern River Land and Canal

272 Company's answer to the amended complaint, on the ground that the matters and things set up in such portions of said answer were sham, irrelevant and redundant. The hearing on said motion came up for a hearing on said 11th day of April, 1881, R. E. Houghton appearing for the plaintiffs, and Louis T. Haggin appearing for the defendant, The Kern River Land and Canal Company. In support of said motion, said R. E. Houghton read the said notice of motion and the order of the Judge of this Court shortening notice of the time of said hearing, and the answer of said defendant, The Kern River Land and Canal Company;

273 That after reading said papers and argument had, the Court took said motion under advisement, and on the 11th day of April, A.D. 1881, the Court denied said motion. To which ruling of the Court, the said plaintiffs then and there duly excepted.

The Court denied plaintiffs' motion to strike out as redundant the following portion of said answer, to wit:

"Defendant denies, on its information and belief:

"1st. That the waters of Kern River or any part
274 "thereof, flow or have flowed, or are or ever have
"been wont to flow to, along, by, through, over or
"upon the lands, or any part thereof, in said com-
"plaint described.

"2d. That plaintiffs or any of them are entitled to
"have the waters of said River, or any part thereof,
"flow to, along, by, through, over or upon said lands
"or any part thereof.

"3d. That said lands or any part thereof are, or
"ever have been, riparian lands, or lands bordering
275 "or situated upon a running stream or natural water-
"course.

"Defendant denies that it has wrongfully diverted,
"appropriated or consumed, a part or any of the
"waters of said river.

"Defendant denies that it has in any manner what-
"soever injured plaintiffs, or any of them, or the said
"lands or any part thereof.

"Defendant denies that it has not the right, and is
"not entitled to take out, divert, appropriate, use and
"consume portions of the waters of said river, or that
"it has taken out, diverted, appropriated, used or

276 " consumed more of the waters of said river than it " was by right entitled to."

To which ruling of the Court the plaintiffs then and there duly excepted.

The Court denied plaintiff's motion to strike out as sham, irrelevant and redundant the following portion of said answer, to wit:

" Defendant alleges, on its information and belief, " that by virtue of a compliance by itself, its predeces- " sors in interest and grantors, with the general and
277 " local customs well established and recognized as part " and portion of the common law of the United States, " and of this State, in the matter of and relative to the " appropriation, diversion and use of water and acqui- " sition of water rights within the State of California, " as well as with the statute laws of the United States, " and of the State of California, on such subject made " and provided, defendant has appropriated, acquired " and become entitled to, and now is entitled to, " and of right may take out, appropriate, divert, use " and consume a large part, or portion, to wit: seventy- " four thousand (74,000) inches measured under a four-
278 " inch pressure of the flowing waters of said Kern " River."

To which ruling of the Court, the plaintiffs then and there duly excepted.

The Court denied plaintiff's motion to strike out, as redundant, the following portion of said answer, to wit:

" Defendant denies—

" 1st. That it has wrongfully diverted, appropriated " or consumed a part or any of the waters of the Kern
279 " River, in said complaint mentioned;

" 2d. That it has in any manner whatsoever in- " jured plaintiffs or any of them, or the lands, or any " part thereof, in said complaint described.

" 3d. That it has not the right, and is not entitled " to take out, divert, appropriate, use and consume " portions of the waters of said river.

" 4th. That it has taken out, diverted, appro- " priated, used or consumed of said waters more than " that part thereof, to which it was entitled."

To which ruling of the Court, the plaintiffs then and there duly excepted.

The Court denied plaintiffs' motion to strike out as sham, irrelevant and redundant the following portion of said answer, to wit:

" On its information and belief, defendant alleges:

" That heretofore, to wit: on or about the 4th day " of May, A.D. 1875, defendant's grantors, acting in the " full faith and bona fide belief that a large portion, to " wit, more than 74 thousand (74,000) inches, meas-
" ured under a four-inch pressure, of the waters of " said Kern River, were unused, vacant, unappropri- " ated and free and open to appropriation and use, " posted a certain notice of appropriation of water on " the north bank of said river, in Kern County, State " of California, at a point on or about the southwest " quarter of Section Thirteen (13) in Township Twen- " ty-nine (29) south, Range Twenty-seven (27) east, " Mount Diablo base and meridian, according to the " United States Surveys, wherein they claimed and " whereby they notified plaintiffs, plaintiffs' grantors, " and all persons whomsoever it might concern, that
" they claimed and appropriated and proposed and in- " tended to take out and divert, use and consume a " large part and portion, to wit: seventy-four thousand " (74,000) inches, measured under a four-inch pres- " sure, of the flowing waters of said Kern River, for " the purpose of irrigating certain lands in said notice " described, and of supplying water thereunto and " thereon for other purposes in said notice set forth; " That within ten days after the posting of said notice, " to wit: on the 4th day of May, A.D. 1875, the said " notice was duly recorded in the office of the County " Recorder of said Kern County, in Book 1 of Water
" Rights, page 37, to which said record reference is " here made, and which said record is made a part " hereof; That defendants' said grantors thereby ap- " propriated and acquired the said amount of the flow- " ing waters of said Kern River, with the right to take " out, divert, use and consume the same for the uses " and purposes in said notice mentioned, all of which " said appropriations, rights and properties they, (de- " fendants' said grantors) on, to wit: the 18th day of " May, A.D. 1875, granted, bargained and sold, trans- " ferred, assigned and conveyed to this defendant;

284 "That within twenty days after the posting of said
"notice, as aforesaid, to wit: on or about the day
"of May, A.D. 1875, defendant for the purpose of
"utilizing said waters of Kern River in the manner
"and at the places in said notice mentioned, com-
"menced the construction of that certain ditch or
"canal known as the Calloway Canal, and being the
"same as in said complaint described, and thereafter
"and thenceforth defendant continuously and diligent-
"ly prosecuted the work on said canal until the same
"was completed, and expended thereon and in the
"construction thereof large and vast sums of money,
285 "amounting in the aggregate to, to wit: ninety thou-
"sand ($90,000) dollars; That during the construction
"of said canal, defendant diverted and used the afore-
"said amount of water in irrigating and fertilizing
"the lands in said notice described, and for stock and
"other beneficial purposes on said described lands,
"and defendant has continued so to use said amount
"of water through said canal from and after the com-
"pletion thereof."

To which ruling of the Court the plaintiffs then and there duly excepted.

286

The Court denied plaintiffs' motion to strike out as sham, irrelevant and redundant, the following portion of said answer, to wit:

"That for more than ten years prior to and next
"preceding the posting of said notice and the appro-
"priation and claim of said waters by defendants' said
"grantors, all and every part of those certain lands in
"said complaint described were lying entirely waste,
"uncultivated and unoccupied, and no water whatso-
"ever from the said Kern River was used thereon for
287 "any useful or beneficial purpose, or for any purpose
"whatsoever; and defendants' said grantors and de-
"fendant, knowing said facts, verily believed that no
"water whatsoever was claimed for or on said lands
"or any part thereof, by plaintiffs or any of them, or
"by plaintiffs' grantor or grantors, or by the grantor
"or grantors of any of the plaintiffs, or by any person
"or persons whatsoever; that neither defendant nor
"defendant's said grantors, or any of them, knew or
"had any means of knowing that plaintiffs or any of
"them, or the grantor or grantors of plaintiffs or of any
"of them, had or claimed any rights whatsoever in or

288 " to the waters of said Kern River or any part thereof;
" that divers and various other parties, strangers to
" this suit, seeing and knowing that this defendant
" was constructing the said canal, and had diverted
" and appropriated, and was diverting and appropriat-
" ing the said waters of Kern River, for the purpose of
" supplying and distributing the same to the lands in
" said notice described, and seeing and knowing that,
" from time immemorial, no water from said river had
" been used, and that none was being used, upon the
" lands or any part thereof in said complaint described,
" and verily believing that neither plaintiffs, nor any
289 " of them, nor plaintiffs' grantor or grantors, nor the
" grantor or grantors of any of the plaintiffs, claimed
" or asserted any rights whatsoever to the waters of
" said river or any part thereof, or contemplated or
" proposed using said waters or any part thereof, and
" verily believing that this defendant had acquired
" and possessed a valid and vested right to the said
" amount of the flowing waters of said Kern River;
" and abiding in the faith and belief that the lands and
" every part thereof in said notice described would
" ever be supplied with water from said Kern
290 " River, for irrigating and other purposes, by this
" defendant, through its said canal, [which said
" faith and belief were induced and confirmed
" by the silence of plaintiffs, and ea h of them,
" and of plaintiffs' grantor and grantors, and the
" grantor and grantors of each of the plaintiffs, in
" making any demand for, or asserting any claim to,
" the said waters of Kern River, or any part thereof,]
" entered upon and purchased from the Government
" of the United States, and from other parties, large
" and vast tracts of land bordering upon, or along the
" course of said Calloway Canal, [and being within
291 " and forming a part of that larger tract of land in said
" notice described, knowing that with the certainty of
" having and receiving water thereon from said canal,
" for irrigating, stock and domestic purposes, the
" same were, and ever would be, of great and con-
" stantly increasing value,] and expended therefor and
" thereon, in improving the same, large sums of
" money, amounting in the aggregate to, to wit: more
" than two millions of dollars, none of which said
" lands would they have purchased, and none of said
" sums of money would they have expended, were it
" not for their said knowledge, faith and belief above

292 " set forth, they well knowing that all of said lands in
" said notice described were, and ever would be,
" utterly and absolutely worthless, if deprived of the
" water from said Kern River through said canal; that
" said third parties so believing that this defend-
" ant had, and would ever have the right to appropri
" ate and divert, through its said canal, the aforesaid
" amount of water from said Kern River, and that
" their, and each of their said tracts of land so pur-
" chased and improved would ever be, and have the
" right to be supplied by this defendant through its
" said canal with water from said Kern River, for irri-
293 " gation and for other purposes, made and entered
" into certain and sundry contracts with this defend-
" ant, whereby this defendant bound and obligated
" itself to furnish and supply to the said parties upon
" their said several tracts of land, water for irrigating
" the same, and for stock and domestic purposes; that
" defendant would not have made nor entered into
" said contracts, or any of them, were it not for its
" reliance, faith and belief, based upon the facts here-
" inbefore recited, that it had the right to take out,
" appropriate, divert, use and consume for the pur-
" poses in said notices specified, the aforesaid amount
294 " of the flowing waters of said Kern River; that
" plaintiffs and each of them, and plaintiffs' grantors
" and each of them, well knowing the facts herein
" alleged, and also knowing that defendant was, in the
" construction of said canal, entering upon and under-
" taking a vast and extensive work, which would neces-
" sitate large and constant outlays and expenditures of
" money, and knowing, further, that defendant was
" actually expending in the construction of said canal
" large and vast sums of money, and that during the
" construction of said canal defendant was taking out
295 " and diverting, and when the said canal should be
" completed defendant would continue to take out and
" divert through the same a large portion, to wit: the
" amount hereinabove stated, of the flowing waters of
" the said Kern River, and also knowing when the
" said canal was completed that defendant did take out
" and divert, appropriate, use and consume, and from
" the time of its completion to the commencement of
" this action continued to take out and divert, appro-
" priate, use and consume through the said canal the
" aforesaid amount of the flowing waters of said Kern
" River, and further, knowing that defendant and de-

296 " fendant's grantors were, each and all of them, igno-
" rant that plaintiffs, or any of them, or plaintiffs'
" grantor or grantors, or any of them, or the grantor
" or grantors of any of the plaintiffs, had or claimed
" any right whatsoever in or to the waters of said Kern
" River, or any part thereof, and further knowing
" that defendant would not have undertaken the
" construction of said canal, nor have purchased
" the same, nor have expended said or any sums
" of money thereon, nor have made or entered
" into the aforesaid contracts, or any of them, were it
" not for the reliance and belief which defendant had
297 " that defendant was lawfully entitled to the said
" amount of the flowing waters of said Kern River,
" with the right to take out, divert, appropriate, use and
" consume the same through the said canal; yet, and
" notwithstanding, plaintiffs, and each of them, and
" each of their grantors, and each of the grantors of
" any of the plaintiffs, stood by and saw, acquiesced in,
" consented to, and impliedly approved, the appro-
" priation of said waters by defendant and defendant's
" grantors, and the work that was done, and was being
" done by defendant in the matter of the construction
" of said canal, and the preparations defendant was
298 " making for, and with the well-known and avowed
" intention of diverting, appropriating, using, and
" consuming the waters of said River to the amount
" above mentioned, but made no objection or opposi-
" tion to the same, nor did they or any of them notify
" or intimate to defendant, or to defendant's gran-
" tors, that they or any of them had or claimed any
" right whatsoever, in or to the waters of said Kern
" River, or any part thereof; and by their acts, their
" silence and their failure to assert or make known any
" rights which they or any of them had in or to the
299 " said waters or any part thereof, plaintiffs and their
" grantors encouraged and confirmed defendant in its
" belief that they neither had nor claimed, and that
" none of them had or claimed any interest in or
" right to the waters of Kern River, or any part
" thereof; and plaintiffs, and each of them are now
" estopped and precluded from asserting any rights
" which they or any of them have or may have in or to
" the waters of said Kern River, or any part thereof,
" adverse to this defendant; that if plaintiffs or any of
" them, after having tacitly approved and consented
" to the said acts of defendant and defendants' said

300 " grantors hereinabove recited, be now permitted to " assert or maintain any right, claim, or interest " whatsoever in to the waters of said Kern River as " against this defendant, the aforesaid acts and con- " duct of plaintiffs will be a fraud upon the rights of " this defendant, and defendant will be thereby greatly " and irreparably injured."

To which ruling of the Court the plaintiffs then and there duly excepted.

The Court denied plaintiffs' motion to strike out as redundant, the following portion of said answer,
301 to wit:

" Defendant denies,

" 1st. That it has wrongfully taken out or diverted, " appropriated, used or consumed a part or any of the " waters of the Kern River, in said complaint men- " tioned;

" 2d. That it has in any manner injured plaintiffs, " or any of them, or the lands or any part thereof, in " said complaint described."

302 To which ruling of the Court the plaintiffs then and there duly excepted.

The Court denied plaintiffs' motion to strike out as sham, irrelevant and redundant, the following portion of said answer, to wit:

" On its information and belief, defendant alleges:

" That at various points on said river (all above the " lands and every part thereof in said complaint des- " cribed), heading thereon and leading therefrom, are " several large canals, owned by various and diverse
303 " parties, strangers to this suit; That amongst said " canals and canal owners are the following, to wit: " the Beardsley Canal, owned by the Kern River Water " and Irrigating Company; the Kern Island Irrigating " Canal, owned by the Kern Island Irrigating Canal " Company; the Farmers' Canal, owned by the Farm- " ers' Canal Company; the Stine Canal, owned by the " Stine Canal Company; the Anderson Canal, owned " by the Anderson Canal Company; the Gates Canal, " owned by the Gates Canal Company; the Buena " Vista Canal, owned by the Buena Vista Canal Compa- " ny; the James Canal, owned by the James Canal Com-

304 " pany; the Plunkett Canal, owned by the Plunkett
" Canal Company; the Meacham Canal, owned by the
" Meacham Irrigation Canal Company; the Goose
" Lake Canal, owned by the Goose Lake Canal Com-
" pany; the Pioneer Canal, owned by the Pioneer Ca-
" nal Company; the James and Dixon Canal, owned
" by the James and Dixon Canal Company; the Joyce
" Canal, owned by the Joyce Canal Company; the
" South Fork or Panama Canal, owned by the South
" Fork Canal Company, and the Johnson Canal, owned
" by the Johnson Canal Company; That all of said
" above named canal companies, except the South Fork
305 " Canal Company, and the Johnson Canal Com-
" pany, are corporations duly organized and existing
" under and by virtue of the laws of the State
" of California; That more than five years next pre-
" ceding the several times when, as in said complaint
" alleged, defendant did divert or take out water from
" said river, and more than five years next preceding
" the commencement of this action, said canal owners
" had, by virtue of a compliance by themselves, their
" respective predecessors in interest and grantors,
" with the general local customs and usages, laws and
" regulations (as well those of the United States as
306 " those of the State of California), in the matter of
" and relative to the appropriation, diversion, use and
" consumption of water and the acquisition of water
" rights within this State, acquired the right to take
" out, divert, appropriate, use and consume for irriga-
" tion and other beneficial uses, each through its said
" and respective canal, a large part and portion of the
" flowing waters of said river; That at, and for more
" than five years next preceding, all the said several
" times when, as in said complaint alleged, defendant
" took out or diverted water from said river, and at
307 " and for more than five years next preceding the com-
" mencement of this action, said canal owners, under
" claim of right, did and now do openly, notoriously,
" continuously, exclusively and adversely to plaintiffs,
" and to all the world, take out and divert, appropri-
" ate, use and consume for irrigation and other bene-
" ficial uses, each through its said and respective ca-
" nal, a large portion of the flowing waters of said
" river, so by it respectively acquired, ever and at all
" said times having and claiming the right so to do by
" virtue of the compliance with the general and local
" customs, usages, laws and regulations aforesaid; that

308 "the waters so taken out and diverted by said canal
"owners are, and ever have been used and consumed
"in irrigation and other beneficial uses, and never
"again returned to the channel of said river; That
"after supplying to the said canals the said amounts
"of flowing water to which said canal owners are and
"during all the times herein mentioned have been en-
"titled and accustomed to have and receive, and of
"right ought to have and receive from said river, there
"is not, and, except in times of sudden floods and
"freshets, never has been sufficient water left or re-
"maining in said river to, in its natural flow, flow down
309 "to or reach the lands or any part thereof in said com-
"plaint described; That of the surplus waters of said
"river, over and above the said amounts to which, as
"aforesaid, the said canal owners are, and during all the
"times herein mentioned have been, entitled and accus-
"tomed to receive from said river in said canals, the
"amount by defendant taken out or diverted is not,
"and never has been sufficient to, if left to itself, in its
"natural flow, flow down to, or reach the lands, or any
"part thereof, in said complaint described."

To which ruling of the Court the plaintiffs then and
310 there duly excepted.

The Court denied plaintiffs' motion to strike out as redundant the following portion of said answer, to wit:

"Defendant denies,

"1st. That it has wrongfully taken out or diverted,
"appropriated, used or consumed a part or any of the
"waters of the Kern River in said complaint men-
"tioned;

"2d. That it has in any manner injured plaintiffs
"or any of them, or the lands or any part thereof in
311 "said complaint described."

To which ruling of the Court the plaintiffs then and there duly excepted.

The Court denied plaintiffs' motion to strike out as sham, irrelevant and redundant the following portion of said answer, to wit:

"On its information and belief, defendant alleges:

"That at various points on said river (all above the
"lands and every part thereof in said complaint de-

312 " scribed), heading thereon and leading therefrom,
" are several large canals, owned by various and di-
" verse parties, strangers to this suit; That amongst
" said canals and canal owners are the following, to
" wit: the Beardsley Canal, owned by the Kern River
" Water and Irrigating Company; the Kern Island
" Irrigating Canal, owned by the Kern Island Irrigat-
" ing Canal Company; the Farmers' Canal, owned by
" the Farmers' Canal Company; the Stine Canal,
" owned by the Stine Canal Company; the An-
" derson Canal, owned by the Anderson Canal
" Company; the Gates Canal, owned by the Gates
313 " Canal Company; the Buena Vista Canal, owned
" by the Buena Vista Canal Company; the James
" Canal, owned by the James Canal Company;
" the Plunkett Canal, owned by the Plunkett Canal
" Company; the Meacham Canal, owned by the
" Meacham Irrigation Canal Company; the Goose
" Lake Canal, owned by the Goose Lake Canal Com-
" Company; the Pioneer Canal, owned by the Pioneer
" Canal Company; the James and Dixon Canal, owned
" by the James and Dixon Canal Company; the Joyce
" Canal, owned by the Joyce Canal Company; the
" South Fork or Panama Canal, owned by the South
314 " Fork Canal Company; the Johnson Canal, owned
" by the Johnson Canal Company; That all of said
" above named canal companies, except the South Fork
" Canal Company and the Johnson Canal Company are
" corporations duly organized and existing under and by
" virtue of the laws of the State of California; That
" more than five years next preceding the several times
" when, as in said complaint alleged, defendant did
" divert or take out water from said river, and more
" than five years next preceding the commencement
" of this action, said canal owners had, by virtue of a
315 " compliance by themselves, their respective prede-
" cessors in interest and grantors with the general and
" local customs and usages, laws and regulations (as
" well those of the United States as those of the State
" of California), in the matter of and relative to
" the appropriation, diversion, use and consumption
" of water and the acquisition of water rights within
" this State, acquired the right to take out, divert,
" appropriate, use and consume for irrigation and
" other beneficial uses, each through its said and re-
" spective canal, a large part and portion of the flow-
" ing waters of said river; That at, and for more than

316 " five years next preceding, all the said several times
" when, as in said complaint alleged, defendant took
" out or diverted water from said river, and at and
" more than five years next preceding the commence-
" ment of this action, said canal owners, under claim
" of right, did and now do openly, notoriously, con-
" tinuously, exclusively and adversely to plaintiffs and
" to all the world, take out and divert, appropriate,
" use and consume for irrigation and other beneficial
" uses, each through its said and respective canal, a
" large portion of the flowing waters of said river, so
" by it respectively acquired, ever and at all said times
317 " having and claiming the right so to do by virtue of
" the compliance with the general and local customs,
" usages, laws and regulations aforesaid; that
" the waters so taken out and diverted by said
" canal owners are and ever have been used and con-
" sumed in irrigation and other beneficial uses, and
" never again returned to the channel of said river;
" That after supplying to the said canals the said
" amounts of flowing water to which said canal owners
" are and during all the times herein mentioned have
" been entitled and accustomed to have and receive,
" and of right ought to have and receive from said
318 " river, there is not, and except in times of sudden
" floods and freshets, never has been sufficient water
" left or remaining in said river to, in its natural flow,
" flow down to or reach the lands or any part thereof
" in said complaint described; That of the surplus
" waters of said river, over and above the said amounts
" to which, as aforesaid, the said canal owners are,
" and during all the times herein mentioned have been
" entitled and accustomed to receive from said river
" in said canals, the amount by defendant taken out
" or diverted is not and never has been sufficient to,
319 " if left to itself, in its natural flow, flow down to or
" reach the lands, or any part thereof, in said com-
" plaint described; That at and during all the times
" when, as in said complaint alleged, defendant took out
" or diverted water from said river, the water so taken
" out or diverted by defendant was, by defendant,
" taken out and diverted, appropriated, used and con-
" sumed with the knowledge, permission and consent,
" license and approval of said canal owners so having
" the right and being entitled thereunto; That had de-
" fendant refrained, ceased or abstained from taking
" out and diverting said waters, the same would have

320 "flowed to and into the said canals of said canal own-
" ers, and have been by them appropriated, used and
" consumed, and thereby diverted from said river and
" prevented from flowing to or upon, by, through or
" over the lands, or any part thereof in said complaint
" described; That had defendant abstained from tak-
" ing out or diverting said water, the same would
" never have flowed down to or have reached the said
" lands or any part thereof."

To which ruling of the Court the plaintiffs then and there duly excepted.

321 The Court denied plaintiffs' motion to strike out as redundant the following portion of said answer, to wit:

" Defendant denies:

" 1st. That it has wrongfully diverted or taken out
" a part or any of the waters of the Kern River, in
" said complaint mentioned;

" 2d. That it has not the right to divert and carry
" off the waters of said river;

" 3d. That it has in any manner injured plaintiffs,
322 " or any of them, or the lands, or any part thereof, in
" said complaint described."

To which ruling of the Court the plaintiffs then and there duly excepted.

The Court denied plaintiffs' motion to strike out as sham, irrelevant and redundant, the following portion of said answer, to wit:

"Defendant, admitting that at a point on or about
" the southwest quarter of Section Thirteen (13), in
" Township Twenty-nine (29) south, Range Twenty-
323 " seven (27) east, Mount Diablo base and meridian,
" according to the United States surveys, it takes out
" of, and diverts from the said Kern River, a portion
" of the surplus waters thereof, on its information and
" belief, alleges:

" That below said point where defendant so takes
" out and diverts said waters, there are, and from time
" immemorial have been, large tracts of swamp and
" overflowed lands, whereon, in times of freshets and
" unusual floods, the said river has, from time imme-
" morial, been wont to discharge its surplus waters,

" thereby inundating and submerging said lands and
" rendering them unfit for cultivation, and useless for
" any purpose whatsoever, besides causing thereon the
" formation of pools and ponds of standing water,
" which, during the long and dry summers common to
" that section of country, became foul and stagnant
" and injurious to the health of both man and beast;
" that said lands are and would be fertile, productive
" and of great value, if reclaimed from their swamp
" and overflowed condition; that said lands are owned
" by sundry and divers parties, some of whom are
" stockholders in the Kern River Land and Canal
" Company, this defendant; that owing to the nature
" and the general topography of the surrounding coun-
" try, the said lands can be thoroughly and effectually
" reclaimed by preventing the surplus waters of said
" river from flowing down to, over and upon the same;
" that the only practicable or possible way by which
" such reclamation can be effected is by tapping said
" river at some point high up the same, and diverting
" therefrom and carrying off its surplus waters before
" they can flow to or reach said lands; that for the
" purpose of so reclaiming said lands from inundation
" and overflow, and thereby rendering them fit for
" cultivation and valuable for other purposes, defend-
" ant, for and at the request of the owners of said
" lands, has, at great cost and expense to itself, con-
" structed its said Calloway Canal, leading from said
" river at a point high up the same, to wit: at the
" point hereinabove mentioned, and has thereby tapped
" the said river and opened up a drain or outlet
" through which a large portion of its surplus waters
" are and can be permanently diverted and carried off
" and prevented from flowing down, to and upon the
" said lands; that by so doing defendant has in fact
" prevented a large portion of the said waters from
" reaching said lands, and has thereby benefited and
" improved, and to a great extent reclaimed the same;
" that if defendant be permitted to continue so
" diverting and carrying off said waters, defendant
" will, within a short time, have totally, permanently,
" and effectually reclaimed the said lands from inunda-
" tion and overflow, and have prevented the accu-
" mulation of foul and stagnant water thereon, and
" thereby have rendered said lands healthful and hab-
" itable and fit for cultivation, pasture and other use-
" ful purposes; that if defendant be now stopped or

328 " prohibited from continuing its said work of reclam-
" ation, within a short time hence, all the benefit it
" has conferred upon said lands, and all improvements
" it has thereunto wrought will be lost and destroyed,
" and the said lands will be restored to and again re-
" sume their swamp and overflowed condition, useless
" and worthless to man, and pestilent and unwhole-
" some to the surrounding country."

To which ruling of the Court the plaintiffs then and there duly excepted.

329 The foregoing Bill of Exceptions having been presented to me for settlement, after due notice and within the time allowed by law, I hereby allow and settle the same, and certify the same to be correct.

Dated Bakersfield.

B. BRUNDAGE,
Judge of the Superior Court of Kern County.

Endorsed: Filed February 7, 1882.

Findings.

330 [Title of Court and Cause.]

This cause coming on for trial before the Court, and the parties appearing by their attorneys, and having waived a jury, and the Court having duly heard and considered the evidence, oral and documentary, offered by the respective parties, and having duly deliberated thereon, finds the following facts, to-wit:

1.

That the plaintiffs are the owners of the lands in
331 Schedule "M," attached to their amended complaint, described and acquired their title thereto as and at the times hereinafter set forth:

That on the 18th day of January, 1876, there was granted to the plaintiffs, Miller, Lux and Crocker, by letters patent, by the State of California, the following described portion of said lands, viz:

All of Sections Five (5), Ten (10), Eleven (11), Twelve (12), Thirteen (13, Fourteen (14), Twenty-four (24), Twenty-five (25), and Thirty-six (36); the northeast

quarter; the north half of the northwest quarter; the southeast quarter of the northwest quarter; the north half of the southeast quarter, and the southeast quarter of the southeast quarter of Section Six (6); the south half of Section Four (4); the north half of the northeast quarter, and the northeast quarter of the northwest quarter of Section Eight (8); the north half, the north half of the southeast quarter, the southeast quarter of the southeast quarter, and the northeast quarter of the southwest quarter of Section Nine (9); the northeast quarter, the north half of the northwest quarter, the southeast quarter of the northwest quarter, the north half of the southeast quarter, and the southeast quarter of the southeast quarter of Section Fifteen (15); the north half, the southeast quarter, the north half of the southwest quarter, and the southeast quarter of the southwest quarter of Section Twenty-three (23); the northeast quarter of the northwest quarter, and the east half of Section Twenty-six (26); and the east half of the southwest quarter, and the east half of Section Thirty-five, in Township Twenty-five (25) South, Range Twenty-one (21) East, Mount Diablo Base and Meridian; all of Sections Twenty-four (24), Thirty-one (31), Thirty-two (32), Thirty-three (33), and Thirty-four (34); the north half, the southeast quarter and the northeast quarter of the southwest quarter of Section Twenty-five (25); and the north half, the southwest quarter and the northwest quarter of the southeast quarter of Section Twenty-six (26), in Township Twenty-five (25) South, Range Twenty-two (22) East, Mount Diablo Base and Meridian; the east half, the north half of the northwest quarter, and the southeast quarter of the northwest quarter of Section One (1); the north half of the northeast quarter, the southwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of Section Two (2); the east half and the southwest quarter of Section Twelve (12); the east half and the east half of the west half of Section Thirteen (13); the east half of Section Twenty-four (24); and the east half of the east half of Section Twenty-five (25), in Township Twenty-six (26) South, Range Twenty-one (21) East, Mount Diablo Base and Meridian; all of Sections Four (4), Five (5), Six (6), Seven (7), Eight (8), Fifteen (15), Sixteen (16), Seventeen (17), Eighteen (18), Nineteen (19), Twenty (20), Twenty-one (21), Twenty-two (22), Twenty-nine (29), Thirty (30), and Thirty-two (32); the east half, the northwest quarter,

the north half of the southwest quarter, and the southeast quarter of the southwest quarter of Section Thirty-one (31); the southwest quarter of the southeast quarter, and the west half of Section Thirty-three (33); the west half, the north half of the northeast quarter, and and the southwest quarter of the northeast quarter of Section Twenty-eight (28); the northwest quarter, the north half of the northeast quarter, the southwest quarter of the northeast quarter, and the northwest quarter of the southwest quarter of Section Twenty-three (23); the southwest quarter and the southwest quarter of the northwest quarter of Section Thirteen (13); the west half, the southeast quarter, the west half of the northeast quarter, and the southeast quarter of the northeast quarter of Section Fourteen (14); the north half, the north half of the southwest quarter, and the southwest quarter of the southwest quarter of Section Nine (9); the northwest quarter and the northwest quarter of the northeast quarter of Section Ten (10); the southeast quarter of the southwest quarter of Section Eleven (11); and the west half, the west half of the east half and the northeast quarter of the northeast quarter of Section Three (3), in Township Twenty-six (26) South, Range Twenty-two (22) East, Mount Diablo Base and Meridian.

That on the 17th day of February, 1876, there was granted to the plaintiffs, Miller and Lux, by letters patent, by the State of California, the following described portion of said lands, viz:

The fractional northwest quarter of the northwest quarter, and the fractional southeast quarter of the northeast quarter of Section Eight (8); the fractional southwest quarter of the southeast quarter of Section Nine (9); the fractional southwest quarter of the northwest quarter, the fractional northeast quarter of the southwest quarter, and the fractional southwest quarter of the southeast quarter of Sectiou Fifteen (15); the fractional southwest quarter of the southwest quarter of Section Twenty-three (23); the fractional southeast quarter of the northwest quarter, and the fractional east half of the southwest quarter of Section Twenty--six (26), and the fractional east half of the northwest quarter of Section Thirty-five (35), in Township Twenty-five (25) South, Range Twenty-one (21) East, Mount Diablo Base and Meridian. Being all the swamp and overflowed lands in said subdivisions of said sections.

That, on the 11th day of September, 1876, there was

granted to the plaintiffs, Miller and Lux, by letters patent, by the State of California, the following described portion of said lands, viz:

The north half, the north half of the southwest quarter, the north half of the southeast quarter, the southeast quarter of the southeast quarter of Section Six (6), and the northeast quarter, the northeast quarter of the northwest quarter, and the northeast quarter of the southeast quarter of Section Eight (8), in Township Thirty (30) South, Range Twenty-four (24) East, Mount Diablo Base and Meridian.

That on the 14th day of June, 1877, there was granted to the plaintiffs, Miller and Lux, by letters patent, by the State of California, the following described portion of said lands, viz:

All of Sections Four (4); the east half of the northeast quarter, and the northeast quarter of the southeast quarter of Section Eight (8); all of Section Sixteen (16); the west half of Section Twenty-two (22); the south half of Section Twenty-six (26); the north half of the northeast quarter, and the southeast quarter of the northeast quarter of Section Twenty-eight (28); and the north half of the northeast quarter, the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter of Section Thirty-four (34), in Township Twenty-eight (28) south, Range Twenty-two (22) east, Mount Diablo Base and Meridian; the east half of the northeast quarter, and the northwest quarter of the northeast quarter of Section Two (2); and the northeast quarter, and the northeast quarter of the southeast quarter of Section Twelve (12), in Township Twenty-nine (29) south, Range Twenty-two (22) east, Mount Diablo Base and Meridian; the west half of Section Six (6); the west half of Section Eight (8); the west half of Section Sixteen (16); the east half of the northeast quarter, and the northwest quarter of the northeast quarter of Section Eighteen (18); the east half of the northeast quarter, and the northwest quarter of the northeast quarter of Section Twenty (20); the west half of Section Twenty-two (22); all of Section Twenty-six (26); the northeast quarter, and the northeast quarter of the northwest quarter of Section Twenty-eight (28); the northeast quarter of the northeast quarter of Section Thirty-four (34); and all of Section Thirty-six (36), in Township Twenty-nine (29) south, Range Twenty-three (23) East, Mount Diablo Base and Meridian; the north half of the northeast quarter; the

344 southeast quarter of the northeast quarter, and the northeast quarter of the northwest quarter of Section One (1), in Township Thirty (30) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian; the west half of Section Ten (10), in Township Thirty (30) South, Range Twenty-four (24) East, Mount Diablo Base and Meridian.

That under and in pursuance of a statute of this State, to-wit.: the Act entitled "An Act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern counties," approved March 20th, 1878, it was in the case of *People* v.
345 *Center et al.*, in the late District Court of the Twelfth Judicial District, in and for the City and County of San Francisco, State of California, by a decree of said Court filed the 17th day of September, A. D. 1878, ordered, adjudged, and decreed that Miller, Lux and Crocker, (the plaintiffs herein), have judgment and are entitled to a patent, as in said Act provided, for the following portion or said lands, to-wit.; the east half of Section Five (5); all of Section Nine (9); the east half of the west half, and the east half of Section Twenty-one (21); the east half, the northwest quarter, the north half of the southwest quarter, the southeast quarter of
346 the southwest quarter of Section Twenty-seven (27); and all of Section Thirty five (35), in Township Twenty-eight (28) South, Range Twenty-two (22) East, Mount Diablo Base and Meridian; all of Section One (1) in Township Twenty-nine (29) South, Range Twenty-two (22) East, Mount Diablo Base and Meridian; the east half, the northwest quarter, the north half of the southwest quarter, the southeast quarter of the southwest quarter of Section Seven (7); the east half, the northwest quarter, the north half of the southwest quarter, and the southeast quarter of the southwest quarter of Section Seventeen (17); all of Section Twenty-one (21);
347 the north half of the southwest quarter, the north half, the southeast quarter of Section Twenty-seven (27); and the northeast quarter, the north half of the northwest quarter, the southeast quarter of the northwest quarter, and the northeast quarter of the southeast quarter of Section Thirty-five (35), in Township Twenty-nine (29) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian; all of Section Five (5); the east half, the northwest quarter, and the north half of the southwest quarter of Section Nine (9), in Township Thirty (30) South, Range Twenty-four (24) East, Mount Diablo Base and Meridian.

348 That of the said lands above described as having been granted on the 17th day of February, 1876, by the State of California by letters patent to plaintiffs Miller and Lux, the plaintiff James C. Crocker, upon and at the time of the issuance of the patent therefor, by conveyance from said Miller and Lux, acquired and became the owner of an undivided one-third (⅓) part. That of the said land above described as having been granted on the 11th day of September, 1876, by the State of California by letters patent to plaintiffs Miller and Lux, the plaintiff James C. Crocker, upon and at the time of the issuance of the patent therefor, by conveyance from
349 said Miller and Lux, acquired and became the owner of an undivided one-third (⅓) part. That of the said lands above described as having been granted on the 15th day of June, 1877, by the State of California by letters patent to plaintiffs Miller and Lux, the plaintiff James C. Crocker, upon and at the time of the issuance of the patent therefor, by conveyance from said Miller and Lux, acquired and became the owner of an undivided one-third (⅓) part.

2.

That the said lands described in the patents men-
350 tioned in finding No. 1, were until granted by the State, as set forth in said finding, the property of the State of California, and said State was the owner thereof, and the plaintiffs had not, prior to the issuance of said patents, any right, title, interest, claim, demand or possession, legal or equitable, of, in or to said lands or any part thereof; and that the said lands mentioned in said finding No. 1 as having, in the case of *People* v. *Center et al.*, been adjudged and decreed to these plaintiffs, were until the filing of the decree in the said case of *People* v. *Center*, the property of the State of California, and said State was the owner thereof, and the plaintiffs
351 had not, prior to said filing of said decree, any right, title, interest, claim, demand or possession, legal or equitable, of, in or to said lands or any portion thereof.

3.

That the said lands of plaintiffs are situated in and form part of the body of swamp and overflowed lands designated in these findings and on the map hereto annexed as Buena Vista Swamp, but that said lands do not, nor does any part thereof, border on Buena Vista

352 Slough, nor are said lands or any part thereof situated along Buena Vista Slough, except that as is set forth in findings 18, 71 and 72. The channel of said slough is traceable through the west half of Section Ten (10) and the northeast quarter of Section Five (5), in Township Thirty (30) South, Range Twenty-four (24) East, and as far north as Section Twenty-four (24), in Township Twenty-nine (29) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian; and that the said lands of plaintiffs are, as shown on the annexed map, situated in said Buena Vista Swamp, to which the term Buena Vista Slough is sometimes applied.

353

4.

That except that, that portion of Buena Vista Slough from where New River enters it to Buena Vista Lake, has from the time of the formation of said New River to said slough been a part of said New River, said Buena Vista Slough has not from time immemorial, or for any time, or at all, been a part of Kern River, or of any natural stream or water course.

354

5.

That the waters of Kern River have not nor have any waters flowed to or through Buena Vista Slough at any time or at all, except that as stated in finding 4, that portion of Buena Vista Slough south of where New River enters it has been a part of said New River from the time of the formation thereof to said slough; and except that, as stated in finding 9, the waters flowing down New River continued to and into Buena Vista Slough and thence to and into Kern and Buena Vista Lakes, and that as stated in said finding 9 and in findings 71 and 79, in times of overflow a portion of such

355 overflow would extend northward over Buena Vista Swamp; and except that, as stated in finding 11, in times of high water a portion of the waters of New River flow through the shallow channel in said finding mentioned, to said slough and thence to Buena Vista and Kern Lakes; and except as is stated in finding 12 and in findings 71 and 79, a portion of the overflow of Buena Vista and Kern Lakes would find its way northward along Buena Vista Slough to and over Buena Vista Swamp; and except that, as is stated in finding 67, the regular and natural flow of the waters of New River

356 into Buena Vista and Kern Lakes was interrupted by a dam thrown across said slough, and said waters were forced to flow northward along said slough to and over Buena Vista Swamp, until, as stated in said finding 67, said dam breaking said waters resumed their natural flow to said lakes; and except that, as stated in finding 68, in the year 1877, by the reconstruction of the said dam and the erection of other obstructions, the waters of New River were again turned northward along said slough to and into the canals of the Kern Valley Water Company; and except that, as stated in finding 70, there is a certain percolation and seepage from said river and
357 said lakes by which said swamp is irrigated and moistened and from which water at times rises therein and flows from one hole or depression to another.

6.

That Kern River is a natural stream or watercourse, rising in the Sierra Nevada, and debouching from the mountains into the plains about ten miles northeasterly from the town of Bakersfield, in Kern County—and thence as far down as to a point in Section Seventeen (17), Township Twenty-nine (29) South, Range Twenty-
358 eight (28) East, Mount Diablo Base and Meridian—has always, within the memory of man, flowed in the same channel; but that after reaching said point the course of the river was anciently and down to the winter of 1861–2 in part along a channel known as the South Fork, which then diverged to the left, or southerly, and following a course almost due south, emptied into Kern Lake at its easterly end, and in part along the course of the present channel of the river some three or four miles to a point in Section Twenty-six (26), in Township Twenty-nine (29) South, Range Twenty-seven (27) East, Mount Diablo Base and Meridian; and thence to the
359 left, or southerly, along the channel known as Old River, which followed a southwesterly course and emptied into Kern and Buena Vista Lakes; but until the winter of 1861–2 said South Fork was the main channel of Kern River.

7.

That the waters of Kern River, up to 1862, did not use to run southerly through said South Fork, and thence northerly through Kern Lake, Buena Vista Lake (and the connecting channel between them), and Buena

360 Vista Slough into Tulare Lake; but that up to the winter of 1861-2 the waters of Kern River used to run in part southerly through said South Fork to Kern Lake, and in part through Old River to Kern and Buena Vista Lakes, and did not run thence to or into Tulare Lake or out of said Kern and Buena Vista Lakes, except as is stated in Finding 12.

8.

That in the winter of 1861–2 a flood closed the said South Fork at its head, but said flood did not at the same time open a new channel; but in the winter of
361 1861–2 a flood closed the South Fork at its head, and thenceforth, and until the winter of 1867–8, the natural flow of the waters of Kern River was down to, into, and through said Old River; except that in occasional times of extraordinary high water some water would pass beyond the head of Old River, and, following the course of the channel now known as "New River" down to a point in or about Section Thirty-one (31), in Township Twenty-nine (29) South, Range Twenty-seven (27) East, Mount Diablo Base and Meridian, would there turn to the right, or northward, and continue along the channel known as Goose Lake Slough, and so designated on the
362 map hereto annexed. That from the time when said flood took place, in the winter of 1861–2, until the winter of 1867–8, the said Old River was the main channel of Kern River, and, except as above stated, carried and conveyed in their natural flow all the waters of Kern River to and into Kern and Buena Vista Lakes.

9.

That in the winter of 1867–8 another flood, carrying a large volume of water past the head of Old River, followed the course of the channel now known and desig-
363 nated on the map hereto annexed as "New River," down to the head of Goose Lake Slough aforesaid, in or about Section Thirty-one (31), in township Twenty-nine (29) South, Range Twenty-seven (27) East, Mount Diablo Base and Meridian; and from that point some water passing on southwesterly opened up the balance of the present channel of Kern River, marked on said map "New River;" and thenceforth, until the year 1869 the waters there reaching divided at the head of said Goose Lake Slough, and a portion thereof continued down said newly made channel. That during the winter of

364 1868–9, owing to the shifting of the sands in the bed of the channel, said Goose Lake Slough was closed at its head, and thereafter no water except in occasional years of unusual high water, has flowed naturally into said slough. That after the flood of 1867–8 the waters of Kern River, in their natural flow and at ordinary stages, divided at the head of Old River, and one-half thereof continued down Old River, and the other half followed the present channel of Kern River, known as "New River," except as above stated. But in times of unusual freshets the greater body of water flowed down New River. That such continued to be the flow of the waters of Kern
365 River until the fall of 1877, when the Stine Canal Company built its headgate across Old River at its head, thereby and thenceforth obstructing and preventing the free flow of the waters into the said channel of Old River, and turning the greater portion thereof down the channel of New River, which is, and from the date last aforesaid has been, the main channel of Kern River. That from and after the flood of 1867–8 the waters flowing down New River, except such portion thereof as passed into Goose Lake Slough as aforesaid, continued on in their natural flow to and into Buena Vista Slough, and thence to and into Buena Vista and Kern
366 Lakes. But that in times of melting snow, causing occasional and unusual freshets and extraordinary high water, some water would overflow the banks of said river, at or in the vicinity of Buena Vista Slough, and a portion of such overflow would extend to and as far northward as it reached, spread from side to side over the aforesaid body of swamp and overflowed lands, designated as Buena Vista Swamp.

10.

367 That from the head of Old River to Cole's Crossing, what is known as New River, is the present main channel of Kern River; but that the same was not the main channel of Kern River, prior to 1877; and the flood of 1867-8 did not open that part of New River from the head of Old River to the head of Goose Lake Slough.

11.

That said New River diverges from Old River towards the right, but not northerly; after leaving Old River it runs southwesterly, and joins the Buena Vista Slough

368 at or about Section Five (5), in Township Thirty-one (31) South, Range Twenty-five (25) East, Mount Diablo Base and Meridian, at the point known as Cole's Crossing and so designated on the map hereto annexed, and flows thence to Buena Vista and Kern Lakes, and does not join Buena Vista Slough in or near Section Thirty (30), Township Thirty (30) South, Range Twenty-five (25) East, Mount Diablo Base and Meridian, except that in times of high water, a portion of its waters do flow through a shallow channel, (shown on the map to these findings annexed), and empty into said slough on or about said Section Thirty (30), and thence flow north-
369 erly into Buena Vista Swamp.

12.

That until the construction of the works of the Kern Valley Water Company, in these findings mentioned, occasionally in the winter and spring time of the year, unusual freshets would cause Kern and Buena Vista Lakes to overflow, and a portion of such overflow would find its way northward along Buena Vista Slough and the adjacent country, to and over said body of swamp and overflowed lands, within which plaintiffs' said lands are
370 situated; following, however, no defined course or channel, but generally spreading from side to side throughout said swamp, as far northward as the water reached.

13.

That except from the seepage and percolation and the overflows in these findings mentioned, and from the effect of the artificial obstructions at Cole's Crossing, in these findings described, none of the waters of Kern River flow or ever have flowed to, along, by, through, over or upon the lands of plaintiffs, or any part thereof.

371

14.

That except by being turned northward by the artificial obstructions at Cole's Crossing, in these findings described, and by the overflows and the seepage and percolation in these findings mentioned, none of the waters of Kern River irrigate, or ever have irrigated any of the said lands of plaintiffs; or make or ever have made said lands or any part thereof fit for cultivation, or pasture, or supply, or ever have supplied on said lands, or any part thereof, water for stock or for agricultural or domestic purposes, or for all or any purposes for

372 which an owner of land, bordering on a running stream has a right to use the waters thereof, or for any purposes.

15.

That the diversion, appropriation and consumption of the waters of Kern River, by the defendant, has not prevented or interfered with the natural flow of said waters, or any part thereof, to or through said Buena Vista Slough at any point north of where New River enters it, or to, along, by, through, over or upon the said lands of plaintiff, or any portion thereof, nor has
373 it prevented or interfered with the irrigation of said lands or any part thereof, or the making the same fit for cultivation, or pasture, or the supply of water thereon for stock, or agricultural, or domestic, or other purposes.

16.

That the changes in the course of Kern River, in the preceding findings stated, have affected the supply of water to said Buena Vista Slough and have diminished the supply of water to that portion of said slough north of where New River enters the same, and rendered less
374 frequent the overflows in these findings mentioned. That the flood of 1867-8 in opening up the channel known as New River, carried down large quantities of earth, sand and other matter, and deposited the same in and near said Buena Vista Slough north of Buena Vista Lake, and south of Buena Vista Swamp, thereby filling up the slough at that point, and enlarging the surface area and holding capacity of Kern and Buena Vista Lakes, and increasing the evaporation therefrom. That said waters of Kern River carry a great amount of sediment and sand; and that each year since said flood a
375 portion of such sand and sediment, as well as brush and other matter brought down, has been deposited in and near Buena Vista Slough, thereby still further increasing the said capacity of said lakes and rendering still less frequent the overflows, in these findings mentioned. That from the place where New River enters Buena Vista Slough, the waters of Kern River there flowing in their natural condition, flow southward through said slough and into Buena Vista and Kern Lakes, until said lakes are full, and when full, said Lakes extend so far northward before overflowing, as to embrace within their limits the junction of said river with said slough.

376 17.

That in their natural condition, whatever of the waters of said river or of said lakes, find or ever found their way northward and into said swamp, do not and never did so flow as to constitute a water-course; and the same are and always have been used and accustomed, whenever they reach it, to flow generally over and through said swamp and to squander themselves over the same, spreading from side to side, and having as a boundary and border on each side, the public lands of the United States, outside of the segregation lines
377 of said swamp, as laid down on said map.

18.

That in part, the diagram annexed to the complaint herein, shows the courses and channels of Kern River, and the sloughs and lakes in said complaint mentioned, but not fully and correctly, and except in the particular in finding No. 72 specified, the same are correctly and fully shown and delineated on the map hereto annexed, marked "Exhibit A," and made part of these findings; and said map marked "Exhibit A," correctly shows the
378 body of swamp and overflowed lands within Kern County, which is referred to in these findings as "Buena Vista Swamp."

19.

That the acts done by the defendant in and about the diverting and taking a portion of the waters of Kern River, as in these findings set forth, were done and committed with a knowledge of such of the facts set forth in the complaint herein, only as are in these findings mentioned and found to be true, but that said acts
279 were done and committed without any intention to injure the plaintiffs, or any or either of them, or the lands of the plaintiffs or any part thereof, and were done and committed in good faith, and in the belief that as the prior appropriators of said water, the defendant had a right to do and commit said acts; and the same were done and committed as a means of improving and irrigating certain lands adjoining and near the Calloway Canal, and in these findings described and stated.

380 20.

That except in doing the acts in these findings specified, constituting and relating to the Calloway appropriation, and constructing the Colloway Canal and works and diverting and using the waters of Kern River through and by means thereof, the defendant did not dig away or remove a part or any of the bank of Kern River, or construct a ditch or canal leading away from said river, or thereby or by other works divert or appropriate any of the waters of Kern River, or consume the same, or prevent it from flowing to, along, by,
381 through, over and upon the lands of plaintiffs.

21.

That ever since the 4th day of May, A D. 1875, defendant has claimed the right to divert, appropriate and consume the water by the Calloway Canal and its other works diverted and appropriated.

22.

That the defendant did not, by digging away or removing any of the bank of Kern River, or by constructing any canal or ditch, or otherwise, prevent any of the
382 waters of said river from flowing to, along, by, through, over, or upon any of the said lands of the plaintiffs; nor has defendant, by reason of any works by it done or erected, or otherwise, hindered or prevented any of said waters from flowing to, along, by, through, over or upon the said lands; nor have any of said waters been prevented from so flowing by reason of any diversion, appropriation or consumption thereof by defendant, except as in these findings stated.

23.

383 That, except that, as set forth in these findings, the lands to irrigate which defendant has diverted and is diverting water from Kern River, border upon Kern River, and embrace one of its banks at the head of the Calloway Canal, and that they are and always have been the lands of the United States of America, and that the United States is the riparian owner of all the land on both sides of said Kern River, and that in compliance with law, the defendant and its grantors appropriated the water diverted by it as set forth in Findings 44, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 and 61; said lands are

384 not and never have been naturally irrigated by any of the waters of Kern River or otherwise, nor is the right to the flow of said waters naturally incident and appurtenant to the same or any part thereof.

24.

That except from the percolation and seepage in these findings mentioned, no water ran through or in said Buena Vista Slough, nor through, to, by, along, over or upon the said lands of plaintiffs, between July, 1878, and the commencement of this action: but that such
385 failure of said water so to flow was not by reason of any taking out, diversion or appropriation thereof, or other act by or on the part of the defendant.

25.

That during the period in the preceding finding mentioned, Buena Vista Slough, from Buena Vista Lake to Buena Vista Swamp, was dry, but said swamp was not dry; That such condition of said slough was not in conseqnence of any diversion or appropriotion of defendant.

386

26.

That, except from the percolation and seepage in these findings mentioned, during the period in the preceding finding mentioned, the waters of Kern River did not irrigate or moisten said lands of plaintiffs, or supply water thereon; but that said water did not during said period fail to irrigate and moisten said lands, or to supply water thereon for general uses, as it would naturally have done; and that it was not in consequence of any diversion or appropriation by defendant, that
387 said water failed to or did not irrigate, moisten, or supply any of said lands of plaintiffs.

27.

That none of the said lands of the plaintiffs were, during said period in the preceding finding mentioned, deprived of their natural moisture; nor in consequence of any deprivation of their natural moisture, or of any diversion or appropriation by defendant, did they become dry or deteriorated in value.

388 28.

That a continuance of the diversion and appropriation of the water of Kern River in the future to the extent it has taken place heretofore, and to the capacity of the Calloway Canal, will not deprive the said lands of the plaintiffs of their natural moisture, or cause them to become dry or deteriorated in value, or deprive them of water for general uses, or prevent them from being irrigated or moistened by the waters of said Kern River.

29.

389 That owing to the nature of the climate and the country, and the slight rainfall where the said lands of plaintiffs are situated, the same, unless irrigated by waters flowing from a distance, are unfit for cultivation and pasture; and there is no natural irrigation of them, except that, as is stated in these findings, they are moistened and naturally irrigated by the percolation and seepage and overflows in these findings mentioned; and there is no means of irrigating them at all save by the waters of Kern River, or of Buena Vista and Kern Lakes.

390 30.

That said lands of the plaintiffs have not always (except in seasons of extreme drought, and except when prevented by diversion) been wet and naturally irrigated, during the winter and spring, by the natural flow of the waters of Kern River; that except by the water reaching them through or in consequence of the seepage, percolation, overflows and obstructions at Cole's Crossing, in these findings set forth, said lands have never been wet or irrigated by any waters of Kern River.

391 31.

That except by the seepage and percolation and the overflows in these findings mentioned, and except as stated in Finding 79, the waters of Kern River did not cause said lands of the plaintiffs, or any portion thereof, to be swamp and overflowed land.

32.

That there has always been pasture on said lands of the plaintiffs, without artificial irrigation, but that it

392 never has been possible, without artificial irrigation, to cultivate or raise crops on said lands; that the pasturage on said lands consists of a growth of tules, to the perfection of which artificial irrigation is not requisite.

33.

That the facts that the said lands of the plaintiffs were supplied with water, and were useful for pasturage in dry years, as and to the extent stated in these findings, entered into the consideration of plaintiffs in purchasing said lands, but except as in this finding stated,
393 the plaintiffs were not induced to purchase said lands because they were wet or irrigated, or designated as swamp and overflowed lands.

34.

That plaintiffs did not pay large or any sums of money for said lands of plaintiffs, or expend large or any sums of money in improving the same, or in constructing works for controlling, regulating or utilizing any water supplied to them, on the faith that said lands would have the benefit of the natural or other irrigation or
394 overflow of water for other uses or otherwise; nor have plaintiffs constructed any such works.

35.

That since the diversion by the defendant herein found, the said lands of the plaintiffs have not been drying up, and have not been becoming less fit to produce crops or support cattle, nor will said lands dry up or be continually drying up, or become less fit to produce crops and support cattle, unless defendant be restrained and enjoined from diverting the water.

395

36.

That in consequence of the diversion and appropriation and consumption of the waters by defendant, it has not become and is not necessary to pump water on plaintiffs' lands, nor will it in the future be necessary by reason of a continuance of such diversion, appropriation and consumption to pump water thereon; and that it has not been necessary, and will not, unless defendant be restrained from so diverting and appropriating and consuming the waters of Kern River, be necessary to pump water on said lands, except in ex-

396 tremely and unusually dry and rarely recurring years; but that such pumping has not been and will not be in any manner necessitated or occasioned by the aforesaid diversion, appropriation and consumption by defendant, or by any continuance thereof.

37.

That the waters of Kern River rise amongst the highest mountains of the Sierra Nevada, where there is at times a great accumulation of snow; that at such times the melting of the snow is liable to cause great and ir-
397 resistible floods; that the river bed below the foothills is shallow, and of insufficient capacity in time of flood to carry off the waters which then sweep over the adjacent country; that such accumulation of snow is not usual or accustomed, but is only occasional and in rarely recurring years.

38.

That willows and other trees and shrubs began from time immemorial, and before the diversion by the defendant herein stated, to grow up in the bed of Kern River, both above and below the point of said diver-
398 sion, and the same are still growing and becoming year by year more serious obstructions to the river channel; but that such growth was not by reason of or a consequence of or enhanced by said diversion.

39.

That if left to the operation of natural causes, in times of flood all the water of Kern River might and probably would be forced aside from its present channel, so as never to reach any of said lands of plaintiffs; but that there is no danger that by reason of the diver-
399 sion of the defendant, or otherwise than as is stated in Finding 41, said water would be forced aside from its present channel, or be diverted from any portion of said lands, or that said lands will suffer any detriment.

40.

That the country along Kern River below where the South Fork branches off is destitute of hills; that Kern and Buena Vista Lakes, Goose Lake and Tulare Lake occupy the lowest depressions of the valley between the Sierra Nevada and Coast Range of mountains; that the

400 country along said river slopes gradually towards Kern and Buena Vista Lakes to the south, and towards Goose Lake and Tulare Lake towards the north; that Goose Lake and Tulare Lake are lower than Kern and Buena Vista Lakes; but that said lakes do not, nor does any two or more of them, form or constitute a chain of lakes, except that Kern and Buena Vista Lakes are connected, and since the year 1868, when full, form one continuous sheet of water.

41.

401 That from any point on Kern River, from the mountains down to Buena Vista Slough, a line drawn across the country to Tulare Lake, by way of Goose Lake, would be much shorter than the present course taken by the water which reaches Tulare Lake; that the soil between Kern River (below the foothills) and Goose Lake is everywhere light and sandy, and such as would offer little resistance to a current of water; that several large canals have been made on the northerly side of Kern River, leading towards Goose Lake, and connecting with an old slough, which continues on and leads into Goose Lake, but that said Goose Lake does not
402 connect with Tulare Lake; that however the channel of said Kern River may become obstructed by trees and shrubs, or otherwise, there is no danger that in case of a flood in said river the whole body, or any, of its waters will take the shortest course, or any course, to Goose Lake; but the said river, if so obstructed, in case of flood, would probably be permanently shifted more to the left or southward, and take a shorter course than at present to Kern and Buena Vista Lakes; and, except as herein stated and found, there is no danger that any of the water of said river may take the shortest course to Goose Lake, or the river bed be per-
403 manently shifted, or any of its waters diverted from any of the said lands of plaintiffs, or that thereby the same would be in any manner affected or depreciated in value.

42.

That except such rights as were acquired by the Calloway appropriation, in these findings mentioned, defendant is not the owner of any land, and never has been a riparian proprietor on said Kern River, nor on any of the waters, sloughs or channels thereof, nor on any of the lakes in these findings mentioned.

404 43.

That the said lands of plaintiffs have not been irreparably or otherwise injured by any act or acts of the defendant, or by its diversion, appropriation or use of the waters of Kern River, in these findings set forth, and that the said acts of the defendant, if suffered to continue, will not be or cause irreparable or any injury to said lands, or any part thereof, and will not cause the ruin of said lands, or any part thereof; that they will not be grievances, but will be constantly recurring, and will be such as can be compensated in damages; and
405 that for the same the plaintiffs have, and always will have, a plain, speedy and adequate remedy and relief at law.

44.

That the defendant is, and at the time of the commencement of this action and prior thereto was, a corporation duly created, organized and existing under, in pursuance and by virtue of the laws of the State of California; that defendant was incorporated on the 18th day of May, A. D. 1875, for the purposes of constructing a canal known as the Calloway Canal, which is in
406 these findings hereinafter more particularly described, for irrigating, manufacturing, commercial and mining purposes; of buying and selling, leasing or otherwise acquiring lands, and managing the same; of raising, buying and selling live stock, and generally engaging in every branch of business pertaining to canals, agricultural, timber, mineral or grazing lands.

45.

That the said lands of plaintiffs have never bordered or been situated, in whole or in part, upon any water course or natural stream.
407

46.

That no water course or natural stream flows or flowed to, along, by, through, over or upon said lands of plaintiffs, or any part thereof.

47.

That there is not and has not been any right whatsoever to the flow of the waters of Kern River, naturally or otherwise, incident or appurtenant to said lands of plaintiffs, or any part thereof.

48.

That plaintiffs are not and have not been, nor is or was any of them, the riparian proprietors or proprietor, owners or owner of lands on or bordering upon Kern River, or any of the branches, sloughs or channels thereof.

49.

That plaintiffs are not and have not been, and that none of them is or ever has been, by virtue of the ownership, possession or occupation of the said lands of plaintiffs or otherwise, riparian proprietors, owners, proprietor or owner, or entitled to have the waters of Kern River, or any part thereof, flow to, along, by, through, over or upon said lands, or any part thereof, or to take out, divert, appropriate or use any of said waters.

50.

That except the said Buena Vista swamp and except the sixteenth (16th) and thirty-sixth (36th) sections in each township, which belong to the State of California, all the lands delineated upon and embraced by the map hereto annexed, marked "Exhibit A," are and always have been public lands of the United States of America.

51.

That on the 4th day of May, 1875, the grantors of the defendant, desiring to appropriate seventy-four thousand (74,000) inches of the waters of Kern River, measured under a four-inch pressure, posted a notice in writing in a conspicuous place at the point of intended diversion, which is in these findings specified, and stated therein: First, that they claimed the waters of Kern River there flowing, to the extent above mentioned; Second, the purposes for which they claimed it and the place of intended use, as is in these findings specified; Third, the means by which they intended to divert said water, and the size of the ditch or acqueduct through which they intended to divert it, as in these findings is specified. A copy of said notice was within ten days after it was posted as aforesaid, recorded in the office of the County Recorder of the County of Kern, in which county said notice was posted. Within sixty days after said notice was posted, the defendant commenced the excavation and construction of the said works in which

412 it was intended to divert said water, and prosecuted said works diligently and uninterruptedly to completion, and thereby diverted said waters to the place of intended use.

52.

That the notice mentioned in the preceding finding was posted at the point on the north bank of Kern River, in Section Thirteen (13), in Township Twenty-nine (29) south, Range Twenty-seven (27) east, Mount Diablo Base and Meridian, where the Calloway Canal diverges from Kern River, as shown on the map hereto
413 annexed, marked "Exhibit A," which said point was the point designated and intended by the said grantors of the defendant as the point of diversion of said water.

53.

That as stated in said notice so posted as mentioned in the preceding finding, said water was appropriated for the purpose of irrigating and supplying with water the lands along the route of and susceptible of irrigation by the Calloway Ditch or Canal, as at present constructed, and as designated upon the map hereto an-
414 nexed, marked "Exhibit A."

54.

That as stated in said notice so posted as hereinbefore mentioned, the said grantors of the defendant intended to divert the water appropriated by them, by means of a main ditch or canal, known and in these findings designated as the Calloway Canal, commencing at said point where said notice was posted as hereinbefore found, running thence in a southwesterly course into Section Twenty-two (22), in Township Twenty-
415 nine (29) south, Range Twenty-seven (27) east, Mount Diablo Base and Meridian, a distance of about two and one half ($2\frac{1}{2}$) miles, one hundred and twenty feet wide on the bottom, four feet deep, and one hundred and twenty-eight feet wide on the top; thence in a southwesterly course two and one half ($2\frac{1}{2}$) miles, one hundred feet wide at the bottom, four feet deep, and one hundred and eight feet wide at the top; thence in a northwesterly course to Tulare Lake, thirty (30) miles, more or less, one hundred feet wide at the bottom, four feet deep, and one hundred and eight feet wide at the top.

55.

That the said Notice of Appropriation was signed by the said grantors of the defendant, who, prior to the commencement of this action and within sixty days after the posting of their said Notice of Appropriation, as set forth in these findings, by their voluntary association, formed the said corporation defendant, and granted and conveyed to it all their said water right, privilege and claim, and all their claim to the waters of Kern River, and all rights and privileges acquired by them by virtue of the said Calloway appropriation, ditch and canal mentioned in these findings; and by reason thereof, there became and were vested in the said corporation defendant, and it succeeded to and entered into the possession of, and has ever since continued to have, possess and enjoy the said canal and ditch, and all the tenements, appurtenances, rights, powers and privileges and property theretofore vested in or belonging to its said grantors, or to which they were or became entitled by virtue of said appropriation, or of any of the acts by them performed.

56.

That the Notice of Appropriation of said Calloway Canal in these findings set forth, was recorded by the County Recorder of said County of Kern, in Volume One of Water Rights, the book kept by him according to law for the purpose of recording notices of appropriation of water, on pages 37, 38 and 39.

57.

That upon the execution of the deed and the delivery of possession of said property to the defendant, and within sixty days after the posting of the notice in the preceding finding mentioned, the defendant surveyed and staked out the line of said Calloway Canal as now constructed and as described in said Notice of Appropriation, and began the excavation and construction of said canal, and thenceforth up to the commencement of this action, prosecuted the work thereon diligently and uninterruptedly, and at the time of the commencement of this action had constructed and completed said canal to a point where it crosses Poso Creek, in Section Twenty-six (26), Township Twenty-six (26) south, Range Twenty-five (25) east, Mount Diablo Base and

Meridian, as shown on the said map hereto annexed, a distance of about thirty (30) miles from its head at Kern River, of the following dimensions, to wit: One hundred and twenty (120) feet wide on the bottom, with a grade of four (4) feet per mile for the first two and a half ($2\frac{1}{2}$) miles from the said point where it heads on said Kern River; then sixty (60) feet wide on the bottom, a distance of about two (2) miles, with a grade of about eight-tenths ($\frac{8}{10}$) of a foot per mile; then eighty (80) feet wide on the bottom for a distance of about three (3) miles, with a grade of eight-tenths ($\frac{8}{10}$) of one foot per mile, then eighty (80) feet wide on the bottom to Poso Creek, with a grade varying from eight-tenths ($\frac{8}{10}$) to four-tenths ($\frac{4}{10}$) of one foot per mile, and having a capacity to carry more than six hundred (600) cubic feet of water per second, but not sufficient to carry the said amount of seventy-four thousand (74,000) inches, measured under a four-inch pressure, as claimed in the Notice of Appropriation of water for said canal; and at said time of the commencement of this action, the defendant had also as contemplated by said appropriators and stated in said notice, constructed thirty (30) miles or more of main side or distributing ditches, of from twelve (12) to sixteen (16) feet in width on the bottom, connected with and leading from said main canal, and forming a part of its irrigation system, and irrigating and supplying with water, lands along the route of and susceptible of irrigation by said main canal; and the defendant had up to the time aforesaid, expended in constructing said main canal and side ditches, and the proper and necessary cost of the same had been more than the sum of one hundred and ten thousand ($110,000) dollars.

58.

That since the commencement and until the trial of this action, the defendant has diligently and uninterruptedly continued to prosecute the work of constructing the said main canal and branch ditches, in pursuance of and in accordance with said Notice of Appropriation, and has constructed more than fifty (50) miles of branch and distributing ditches, from twelve to sixteen feet wide on the bottom, in addition to those constructed before the commencement of this action.

424 59.

That in the fall of the year 1875, in further pursuance and execution of the intention expressed in said notice of appropriation, the defendant did dig away and remove a part of the bank of Kern River at the head of said canal, and did thereby, and by means of said canal, divert and appropriate, for the purpose of softening the earth to be excavated, and thereby facilitating the constructing of said canal, a small quantity of said waters of Kern River; and since said year of 1875, as the construction of said canal progressed, the de-
425 fendant has each year diverted through said canal, and conveyed through it and said ditches to the capacity of said Calloway Canal, a portion of the waters of Kern River, and has appropriated and applied the same to useful and beneficial purposes—that is to say, to irrigating and supplying with water lands in said notice of appropriation designated and lying along the route of said canal, and that all of said water so diverted has been needed, used and consumed on said lands.

60.

426 That the lands designated in said notice, and to irrigate which the waters of Kern River were appropriated, and the Calloway Canal was constructed as aforesaid, border upon and lie along said Kern River, and extend therefrom northward in one compact body along the route of said canal.

61.

That without the water so furnished by said Calloway Canal, the said lands lying along the route thereof, and designated in said notice of appropriation, would be as they had always been before the construction of
427 said canal—desert and barren lands, and absolutely unproductive and worthless—but that the portion thereof which has been irrigated has proven to be highly productive and valuable; and that each year it will require less and less water to irrigate each acre of said lands, by reason of the fact that when dry and first irrigated it requires and absorbs more water than it does afterwards, when constantly irrigated, and that the water now conveyed by said canal will hereafter be sufficient to irrigate seventy thousand (70,000) acres of said lands, extending in a body from and including the north bank of Kern River, northwards.

62.

That from the South Fork down to Buena Vista Slough, a distance of about twenty-five miles, on both sides of Kern River, and extending many miles therefrom, there are large tracts of land, embracing many thousands of acres, and very valuable and productive, and capable of sustaining a large population, when artificially irrigated, but which, when not so irrigated, were, and if deprived of such irrigation would again become, barren and unproductive and valueless; that the said lands can only be irrigated by appropriating and diverting and conveying to them the waters of said river, and that ever since the year 1864 and earlier it has been customary for all parties so desiring to so divert, appropriate and convey said waters on to said lands; and that in accordance with said custom and in conformity with law, prior to the first day of May, 1872, several appropriations were made and several canals have been constructed in pursuance and consummation thereof, and that since said last mentioned date, and before the first day of May, 1875, in accordance with said custom, and in conformity with law, a large number of appropriations were made and many canals have been constructed in pursuance and execution thereof; that the larger of said canals are correctly delineated and named on the said map, hereto annexed, and that at the time of the commencement of this action the said lands were irrigated, and for many years prior thereto had been irrigated, with the said waters so appriated through said canals, and in consequence thereof said lands had become profitable, productive and valuable, and settled upon and occupied by a large number of persons and families, and covered with grain fields, vineyards, orchards, gardens and homes; and that if deprived of such water, said lands will again become utterly barren, desert and worthless.

63.

That from, during and at the times when the acts in these findings set forth as constituting the appropriation and diversion by the defendant and its grantors were done, the plaintiffs, and each of them, knew and were informed thereof, and knew and were fully and correctly informed of and concerning the intention of the defendant and its grantors to make said appropriation, and of the extent and purposes thereof, and knew

that, in reliance upon the acquisition of the right to said water so appropriated, the defendant was expending, would expend and had expended the large amounts herein found in the construction of its said works, and that in like reliance third parties were about to expend and did expend much money and labor in irrigating and cultivating the said lands along the route of said Calloway Canal; and were fully informed of all the circumstances surrounding and attending the location, construction and maintenance of said canal and works of defendant, and of the character of said lands; and that if prevented from using said water so appropriated all the said labor, expenditure and effort of the defendant would be fruitless and a total loss; and that the plaintiffs, until the commencement of this action, made no objection to the said appropriation or acts of the defendant, but acquiesced therein, and stood by while the defendant, from the year 1875 to the said 12th day of May, 1879, continued the construction of said canal, and diverted the waters of Kern River through the same every year during the period last aforesaid, and applied the same to the irrigation of said lands; that the said period during which the plaintiffs so neglected and delayed to notify the defendant of their claim to said water, or assert or prosecute whatever rights they had in the premises, was an unreasonable delay, and that the plaintiffs were thereby guilty of gross neglect, and long and unreasonable delay and laches.

64.

That the plaintiffs had actual knowledge of the proposed construction of the Calloway Canal, and of the purpose thereof, as herein found, before the same was commenced, and knew of the commencement of the construction thereof at the time such construction began, and knew of the proposed dimensions thereof, and of the continuous construction thereof, as hereinbefore found, and made no objection thereto, but acquiesced therein from the time of the commencement of said construction to the time of filing their complaint in this action.

65.

That the natural drainage of Kern River and the surrounding country is, and ever has been, to and into Kern and Buena Vista Lakes, and that in their natural

436 condition Kern and Buena Vista Lakes, when full, form one continuous body or sheet of water; that the natural and usual flow of the waters of Kern River, whether through the South Fork or through Old River or through New River, is and has ever been to and into said lakes, and that the ordinary and natural receptacle, terminus and place of discharge of the natural, usual and accustomed flow of the waters of Kern River is and ever has been Kern and Buena Vista Lakes.

66.

437 That the waters of Kern River do not and never did naturally and usually flow to, through, along, by, over or upon the said lands of plaintiffs, or any part thereof; and that until the year 1876, whatever of the water of Kern River flowed to or reached the said lands or any part thereof, was from the unusual and extraordinary overflow of said river or of Kern and Buena Vista Lakes, or from the percolation and seepage in these findings mentioned.

67.

438 That in December, 1875, one Souther commenced, and in January, 1876, completed a dam across Buena Vista Slough, at a point designated on the map hereto annexed, as Cole's Crossing, on or about Section Five (5), Township Thirty-one (31) south, Range Twenty-five (25) east, Mount Diablo Base and Meridian, and south of where the waters of New River enter Buena Vista Slough, and thereby at said point, checked the natural flow of the waters of said river through said slough into Buena Vista and Kern Lakes, and caused the water there flowing to take a northward course and away from the said lakes. That in March, 1876, the
439 pressure of the waters against said dam, broke through the same, and said river resumed its natural flow to Buena Vista and Kern Lakes. That during the said interval of its flow northward, the waters of said New River flowed along said Buena Vista Slough and the adjacent country, to and over Buena Vista Swamp.

68.

That in the fall of 1876, certain parties commenced the construction of two certain canals, which are correctly laid down on the map hereto annexed, and marked respectively "East Side Canal" and "Kern Val-

ley Water Co's. Canal." The said "East Side Canal" commences on Section Fourteen (14), Township Thirty (30) South, Range Twenty-four (24) East, and extends thence some three (3) miles north, on the eastern side of the said Buena Vista Swamp, and does not touch any of said lands of the plaintiffs. The other canal heading on Section Fourteen (14), Township Thirty (30) South, Range Twenty-four (24) East, as at present constructed, extends northward some twenty-four (24) miles, is one hundred and twenty feet wide on the bottom, one hundred and forty feet wide on the top, and ten feet deep, with a fall of one foot per mile, and capable of carrying more than twelve hundred cubic feet of flowing water per second, and terminates at a point outside of said lands of plaintiffs. That in June, 1877, the Kern Valley Water Company, a corporation organized and existing under the laws of California, for the purpose of acquiring canals and water rights in said County of Kern and elsewhere within this State, to be used or disposed of for irrigation, transportation, domestic, mechanical and other purposes, took possession and control of said canals, and thenceforth continued the construction thereof northward towards the lake known as Tulare Lake, designated on said map. That, in the fall of the year 1877, the said Kern Valley Water Company reconstructed the said dam at Cole's Crossing; and, in connection therewith, constructed a levee extending westward to the bluffs or high ground, and running eastward from said dam about one and one-quarter miles, as shown on said map, thereby preventing the waters of Kern River from flowing to Buena Vista Lake and turning the same northward to their said two canals. That, at the head of said canals, and in conjunction therewith, the said Kern Valley Water Company, in 1877, constructed a certain other dam and levee extending completely across the said Buena Vista Swamp, as shown on said map, and thereby completely obstructed and prevented the natural flow of any water into, through, or over said swamp northward of said last mentioned levee, and appropriated and took possession and control of all the waters reaching said levee, and turned the same into the said canals. That the said dam and levee last mentioned are some distance southward from the southermost part of the said lands of the plaintiffs, and from and after their construction no water has naturally flowed, or could naturally flow, northward beyond the head of said

444 canals, or to or upon the said lands of the plaintiffs or any part thereof.

69.

That the construction of the canals, dams and levees described in the preceding finding, was undertaken and prosecuted with the knowledge, consent and approval of the plaintiffs. That the levee last described in said preceding finding was constructed for the purpose of diverting all the water reaching said levee, into the said canals, and such levee does entirely ob-
445 struct, and since its construction has obstructed, the natural flow of any water northward in said Buena Vista Swamp, beyond said levee, and diverts the same into said canals, and that the plaintiffs, at and before the time of the commencement of the construction of the said levee, knew of the purposes thereof, and approved the same and knew of the beginning and prosecution of the construction thereof, and consented to and approved of such construction. That said canals and levee were constructed at great expense, and because of and in reliance upon the said approval and consent of the plaintiffs, and but for such approval and consent would
446 not have been constructed.

70.

That, throughout Buena Vista Swamp, there is a surface stratum of decomposed vegetable loam, varying in depth from one to five feet, and underlying this surface stratum is a bed of sand. That interspersed throughout said swamp there are innumerable holes or depressions, from a few inches to some twelve or fifteen feet deep. That owing to the nature of the subsoil and the character of the country, water from Kern River and Buena Vista Lake percolates and seeps
447 through to and rises in these holes or depressions, and at times spreads or flows from one to another, but in no continuous channel or defined course. That by such percolation and seepage the lands in said swamp are naturally irrigated and moistened.

71.

That from the point where New River enters Buena Vista Slough, a channel extends southerly into Buena Vista Lake, as shown upon the map hereunto annexed. That from said point where said river enters said

448 slough to and into Buena Vista Swamp as far north as Section Twenty-four (24), Township Twenty-nine (29) south, Range Twenty-three (23) east, there is a traceable, but in places detached channel (shown on the annexed map, and thereon designated as Buena Vista Slough) of varying width and depth. That from the river northerly to said swamp, said channel is well defined, but after reaching said swamp to its northern extremity in said Section Twenty-four (24), said channel is not well defined nor continuous, and is not a defined natural channel with bed and banks, but consists more of a series of holes than a regular water-
449 way. That said channel terminates in and is not traceable beyond said Section Twenty-four (24). That whatever waters have gotten down into said swamp without the aid of the artificial obstructions in these findings mentioned, before reaching any of said lands of plaintiffs, have not been confined to said channel, but have spread generally and indefinitely over said swamp, and that said waters do not constitute a regular flowing stream or water-course, but consist, in addition to the seepage and percolation in these findings mentioned, of occasional bursts of water which, in times of freshets or melting snow, overflow the banks
450 of the river above, or flow out of Buena Vista and Kern Lakes after having been stationary therein, and inundate the whole of said swamp as far northward as the water reaches. That said swamp, though sloping slightly toward the north, is generally flat and level, and though interspersed throughout the same, there are channels, hollows and depressions, either natural or made in part by the action of the floods and waters, such channels, hollows and depressions have no continuity or connection one with another, and are found running in all directions and generally throughout said swamp. That whatever flow or movement said waters have or
451 ever had, is not and never was usual or accustomed, but is and was only occasional and sluggish, and in no manner confined to said channels, hollows or depressions.

72.

That the portion of Buena Vista Slough from New River to Buena Vista Swamp, though continuous and well defined, is in places shallow and does not constitute a water-course, and the waters which ~~form~~ the overflows, elsewhere in these findings mentioned, reach

452 said swamp over the surface of the country; are not confined to the bed and banks of said slough, but spread and flow as well over the adjacent country as through the slough itself; and that such flow is not usual, definite, or accustomed, as is, nor does it correspond with that of the waters in, Kern River before reaching Buena Vista and Kern Lakes, but is only occasional, as is in these findings elsewere described. That the slough or channel marked on the annexed maps as Buena Vista Slough is as far northward as, and until reaching Buena Vista Swamp, known as and called, Buena Vista Slough; but after reaching said
453 swamp and ceasing to be well defined or continuous, as in these findings set forth, it ceases to be distinguished as Buena Vista Slough, and the term Buena Vista Slough is then applied to and used to designate the whole of said swamp, and not any particular channel therein.

73.

That the use to which the water diverted by the defendant was applied was to supply a natural want, and the quantity taken was necessary and reasonable.

454

74.

That on the lands irrigated by the Calloway Canal irrigation is a natural want, and that defendant took no more of the waters of Kern River than was necessary and reasonable.

75.

That Kern River is not, throughout its whole course down to Buena Vista and Kern Lakes, a perrennial stream, nor during the period of its flow are the waters
455 therein flowing uniform or constant in amount or volume, but the volume and amount of said waters vary and are subject to great and sudden fluctuations. That generally the irrigation season along Kern River is from February to July. That usually during said irrigation season there is ample and abundant water flowing down said river, not only to fill the aforementioned canals and ditches heading on said river—including that of defendant—and furnish and supply to them sufficient water to irrigate the lands by them irrigated, as in these findings stated, but also to flow to said Buena Vista Slough, and since the construction of the

456 dam and Levee at Cole's Crossing, and the turning of the waters there reaching northward, as in these findings mentioned, to wet up and thoroughly irrigate all the lands in Buena Vista Swamp, and supply water thereon for all useful and needful purposes.

76.

That during the irrigation season of the year the amount of water diverted from Kern River by defendant is not sufficient to materially effect or substantially diminish the volume or amount of water usually reach-
457 ing Buena Vista Slough; and that during the balance of the year none of the water by defendant diverted would, if not so diverted, ever, in its natural flow, flow to or reach the said lands of plaintiffs, or any part thereof.

77.

That the period from July, 1878, to the commencement of this action, was one of unusual scarcity of water throughout the whole course of Kern River; and that during said period none of the waters by defendant diverted would naturally have flowed to or reached
458 said lands of the plaintiffs if not so obstructed.

78.

That Buena Vista Slough is on the extreme western side of the valley, lying between the Sierra Nevada and the Coast Range of Mountains. That immediately west and near by said slough the foot-hills of said Coast Range begin to rise. That from the point where Kern River enters the plains on the east, clear across to said foot-hills, is a ridge or stretch of high land, dividing the basin of Kern and Buena Vista Lakes
459 from the basin or trough occupied by Buena Vista Swamp and Tulare Lake. That the slope of said ridge is greater and more precipitous southward, towards Kern and Buena Vista Lakes, than it is northwards, or towards Buena Vista Swamp and Tulare Lake. That from said point where the river enters the plains it follows generally along the crest of said ridge, bearing, however, southward, and keeping on the southern slope thereof to Buena Vista Slough, through which, since the formation of New River, and until prevented by the artificial obstructions at Cole's Crossing, it emptied its waters there reaching into Buena Vista and Kern

460 Lakes. That said ridge extends across Buena Vista Slough, at a point north of where New River enters said slough, and south of Buena Vista Swamp; and, until the construction of the aforesaid obstructions at Cole's Crossing has prevented any of the waters of Kern River, or of Buena Vista and Kern Lakes, from flowing northward to Buena Vista Swamp, except in the occasions of overflow in these findings mentioned.

79.

That from the overflows in these findings mentioned,
461 the water which has reached Buena Vista Swamp has, until obstructed by the works of the Kern Valley Water Company, in findings numbers 71 and 72, mentioned, flowed to the uppermost or southern body of plaintiffs' said lands, and extended northward over said swamp to a greater or less distance towards Tulare Lake, according to the fall of rain and snow, and without any regularity or certainty; but, for more than ten (10) years next preceding the commencement of this action, none of said water has flowed to Tulare Lake, save and except that in exceptional and rarely recurring years of excessive and unusual rain
462 and snow, a portion of said water has flowed to and into said Tulare Lake, following, however, no defined channel over said swamp, but generally spreading throughout the same and not constituting a water-course or regular flowing stream. That the waters which from said overflows reach said swamp, except such surplus portion thereof as passes to Tulare Lake, remain on said swamp for a great length of time. That the overflows and the seepage and percolation in these findings mentioned, did prior to September 28th, 1850, cause said lands within said swamp to be swamp and overflowed lands, and said lands had
463 become and were on said 28th day of September, 1850, swamp and overflowed lands, and as such were granted to the State of California by Act of Congress, approved September 28th, 1850.

80.

That in August, 1878, plaintiffs began to cultivate and thenceforth hitherto have cultivated the west half of Section Ten (10) in Township Thirty (30) South, Range Twenty-four (24) East, Mount Diablo Base and Meridian, and since the dates of their said patents,

464 plaintiffs have pastured their cattle over the lands described therein. But otherwise than in this finding stated plaintiffs have not put said lands to any use or taken or had possession thereof.

And as conclusions of law I find:

1.

That Kern River, the diversion of the waters of which is alleged to be a nuisance, so far as it can be considered a water-course, terminates at and in Buena
465 Vista and Kern Lakes.

From the said lakes to the lands of the plaintiffs there is no water-course, and that defendant has not diverted any water which ought to have run or flowed, or before such diversion did run or flow, or but for said diversion would have run or flowed, to, along, by, through, over, or upon any of the said lands of the plaintiffs.

2.

That even if the waters in question could be deemed
466 a water-course extending from the Sierra Nevada Mountains to Tulare Lake and below, this action cannot be maintained, because it does not appear that the plaintiffs' lands embrace what would then have to be considered the banks or sides of said supposed water course or any part of such banks or sides. But, on that hypothesis, the United States would be the owner of all the lands irrigated by and through which pass the several canals or ditches hereinbefore mentioned and the whole bed of said supposed water-course, save and except only the said Buena Vista Swamp and of all the banks and sides thereof.
467 And that by virtue of its said compliance with the laws of this State, and with the laws of Congress and the local laws, customs and decisions therein referred to, the defendant became the grantee of the United States as riparian owner as aforesaid of the waters, ways, rights and privileges by it appropriated and claimed as aforesaid and that the amount and manner of said appropriation was reasonable and proper and did not exceed what the United States as riparian owner, or the defendant as the grantee and licensee of such riparian owner, had the right to divert and use in the manner and to the extent to which the defend-

468 ant has diverted and used the same, and the amount of water so diverted and used would have been considered reasonable as between an upper and a lower proprietor.

3.

The plaintiffs did not have or acquire any possession, claim, right or title of, in or to the land described in their complaint until sometime in the year 1876, as to a portion and later as to the rest of said lands, and the right of the defendant to the water claimed and diverted by it, vested and accrued in the
469 month of May, A.D. 1875, and the patents put in evidence by the plaintiffs did not convey or grant to, or vest in them any right, title, interest or estate in or to said waters so claimed and diverted by the defendant.

4.

That plaintiffs have been guilty of such laches and neglect as disentitle them to any relief in this action.

5.

470 That by the acts and acquiesence of the plaintiffs as hereinbefore found in the doings of the Kern Valley Water Company, all claims and causes of action growing out of the diversion by the defendant, were before and at the time of the commencement of this action, lost and destroyed, and all riparian rights, if any plaintiffs had, thereby extinguished.

6.

The said diversion has not resulted in, and if continued will not occasion any loss, injury, detriment or damage to the plaintiffs, or to their lands.
471

7.

The defendant is entitled to a judgment that the complaint on the merits be dismissed and that the defendant recover its costs in this cause laid out and expended.

It is ordered that judgment herein be entered accordingly.

November 3, 1881.

B. BRUNDAGE,
Superior Judge.

472 Annexed to the said findings is a map marked "Exhibit A," and both are marked: Filed Nov. 3, 1881.

[Here insert said "Exhibit A."]

Annexed to the said findings is the following:

Order Amending Eleventh Finding.

In the Superior Court of Kern County, State of California.

473

CHAS. LUX et als., Plaintiffs,
vs.
J. B. HAGGIN et als., Defendants. } 214.

In this cause it appearing that by mistake and inadvertence, Finding Number 11 of the findings hereinbefore filed in this cause does not correctly set forth the facts intended to be found herein, and is consequently inconsistent with others of the findings herein; and whereas the said findings, except said Finding Number 11, do correctly set forth the facts intended to be found by the Court herein.

474

Therefore, it is ordered that the said findings be amended and corrected as follows, to wit: That, in lieu and in stead of said Finding 11, as the same now appears on file herein, the following finding be substituted, to wit:

11.

"That said New River diverges from Old River tow-
475 "ards the right, but not northerly; after leaving Old
"River it runs southwesterly, and joins Buena Vista
"Slough at or about Section Five (5), in Township
"Thirty-one (31) South, Range Twenty-five (25) East
"of Mount Diablo base and meridian, at the point
"known as Cole's Crossing, and so designated on the
"map hereto annexed, and flows thence to Buena
"Vista and Kern Lakes, and does not join Buena
"Vista Slough in or near Section Thirty (30), Township
"Thirty (30) South, Range Twenty-five (25) East, of
"Mount Diablo base and meridian, except that in
"times of high water a portion of its waters do flow

476 "through a shallow channel, (shown on the map to "these findings annexed), and empty into said slough "on or about said Section Thirty (30), and thence "flows into Buena Vista and Kern Lakes."

And it is further ordered, that the Clerk of this Court do file this order in said cause, and do annex a duly certified copy of this order to the said findings now on file herein. And it is further ordered, that the said Clerk do forthwith serve, or cause to be served, a duly certified copy of this order on the respective At-
477 torneys of record of the plaintiffs and the defendants herein.

Signed in open Court, this 19th day of November, A. D. 1881.

B. BRUNDAGE,
Superior Judge.

STATE OF CALIFORNIA, }
County of Kern. } ss.

COUNTY CLERK'S OFFICE, }
November 19, 1881. }

478 I, A. T. Lightner, County Clerk of the County of Kern, State of California, and Clerk of the Superior Court, do hereby certify that I have compared the foregoing copy of an order amending findings, in suit No. 214 of said Court, and of the endorsements thereupon, with the original records of the same remaining in this office, and that the same are correct transcripts therefrom, and of the whole of said original records.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, the day and year in this certificate first above written.

A. T. LIGHTNER,
479 [L.S.] County Clerk and ex officio Clerk of said Superior Court of said county.

Endorsed: Filed November 19, 1881.

Judgment.

[Title of Court and Cause.]

This cause came on regularly for trial on the fifteenth day of April, A.D. 1881, R. E. Houghton and Hall McAllister, Esqs., appearing as counsel for plaintiffs, and Louis T. Haggin, John Garber and George Flournoy,

480 Esqs., for the defendant, the Kern River Land and Canal Company, a trial by jury having been waived by the respective parties, and said cause having been heretofore dismissed as to all of the plaintiffs except Charles Lux, Henry Miller and James C. Crocker, and as to all the defendants except the Kern River Land and Canal Company, the cause was tried before the Court sitting without a jury, whereupon witnesses on the part of plaintiffs and defendant, The Kern River Land and Canal Company, were duly sworn and examined, and documentary evidence introduced, and the evidence being closed, the case was submitted to
481 the Court for consideration and decision, and after due deliberation thereon, the Court delivers and files its findings and decision in writing herein, and orders that judgment be entered herein in favor of defendant, The Kern River Land and Canal Company, in accordance therewith, and for its costs herein expended.

Whereupon by reason of the law and the findings aforesaid, it is ordered adjudged and decreed that the plaintiffs take nothing in this action, and that the complaint on the merits be dismissed, and that the defendant, The Kern River Land and Canal Company do have and recover of the plaintiffs, Henry Miller,
482 Charles Lux and James C. Crocker, its costs and disbursements incurred in this action, amounting to the sum of twenty-six hundred and forty-eight and $\frac{90}{100}$ dollars.

Judgment recorded Dec. 10, A.D. 1881, in Book 1, Fol. 152.

Filed Dec. 10, 1881.

N. R. PACKARD,
Dept. Clerk.

Notice of Intention to Move for New Trial.

483 [Title of Court and Cause.]

Please to take notice that the plaintiffs in the above entitled action intend to move this Court that the decision heretofore made in this action be vacated and a new trial granted.

Said motion will be made and based on the following grounds:

1st. Irregularity in the proceedings of the Court and abuse of discretion by the Court, by which the plaintiffs were prevented from having a fair trial.

484 2d. Accident and surprise which ordinary prudence could not have guarded against.

3d. Newly discovered evidence material for the plaintiffs, which they could not, with reasonable diligence, have discovered and produced at the trial.

4th. Insufficiency of the evidence to justify the decision of the Court, and that it is against law.

5th. Errors in law occurring at the trial, and excepted to by the plaintiffs.

485 Said motion will be made upon affidavits and a bill of exceptions.

STETSON & HOUGHTON,
Attorneys for Plaintiffs.

To the clerk of the above entitled Court, and Louis T. Haggin, Esq., att'y for defendant, The Kern River Land and Canal Company.

Rec'd, San Francisco, Dec. 12, 1881, a copy of within notice of intention to move for a new trial.

LOUIS T. HAGGIN,
Att'y for the Def't, The Kern River Land and Canal
486 Company.

Endorsed: Filed Dec. 12, 1881.

Notice of Motion for Order Striking from Files Order Amending Eleventh Finding.

[Title of Court and Cause.]

To Louis T. Haggin, Esq., Attorney for Defendant, Kern River Land and Canal Company:

You will please take notice that on Monday, the 16th
487 day of January, 1882, at 10 o'clock A.M., or as soon thereafter as counsel can be heard, we shall move the above entitled Court, at the Court-room thereof in Bakersfield, Kern County, State of California, for an order striking from the files of the above entitled Court the order made in the above entitled cause on the nineteenth day of November, 1881, that there be filed in place of the 11th finding of fact theretofore filed in said case, a new and other finding of fact, on the ground that the Court had no power to make such order, and on the further ground that said order was made without notice to plaintiffs.

488 Said motion will be based upon the affidavit of R. E. Houghton, with a copy of which you are herewith served, and on the original findings filed herein, and said order of November 19, 1881.

Yours, &c.,

STETSON & HOUGHTON,
Plaintiffs' Attorneys.

Affidavit of R. E. Houghton.

[Title of Court and Cause.]

489 STATE OF CALIFORNIA, }
City and County of San Francisco. } ss.

R. E. Houghton, being duly sworn, says: that he is a member of the firm of Stetson & Houghton, who are the attorneys of record for plaintiffs in this case; that this case was, on the 15th day of July, 1881, after trial and argument, submitted to the Court for its decision; that thereafter, on the 3d day of November, 1881, a decision was rendered in said cause in favor of the defendant, and in the following words: "The plaintiffs "are not entitled to the relief which they claim, and
490 "the findings and judgment must be for the de- "fendants."

That at the time said case was submitted to the Court for its decision, the Judge of said Court requested counsel for the respective parties to submit to him such findings as they desired in said case; and thereafter, and at least sixty days prior to the rendition of the decision herein, such proposed findings were submitted to said Judge.

That the findings as a whole, eighty in number, submitted by the defendants, were signed by said Judge
491 as the findings of the Court in this case, after making some few and immaterial corrections in such findings; that the said findings were never submitted to the counsel for plaintiffs, nor did they ever see them until after they were signed and filed by the Court; that not a single finding submitted by plaintiffs' counsel was by the Court adopted.

That the 11th finding, as filed on the 3d day of November, 1881, read as follows:

"That said New River diverges from Old River "towards the right, but not northerly; after leaving

492 "Old River it runs southwesterly and joins Buena
"Vista Slough at or about Section Five (5), in Town-
"ship Thirty-one (31) south, Range Twenty-five (25)
"east, Mount Diablo base and meridian, at the point
"known as Cole's Crossing, and so designated on the
"map hereto annexed, and flows thence to Buena
"Vista and Kern Lakes, and does not join Buena
"Vista Slough in or near Section Thirty (30), Town-
"ship Thirty (30) south, Range Twenty-five (25)
"east, Mount Diablo base and meridian, except that
"in times of high water a portion of its waters do
"flow through a shallow channel (shown on the map
493 "to these findings annexed), and empty into said
"slough on or about said Section Thirty (30), and
"thence flow northerly into Buena Vista Swamp."

That thereafter, on the 19th day of November, 1881, an order was made in said case by said Court, in the words and figures following:

"*In the Superior Court of Kern County, State of California.*

494 "CHARLES LUX ET ALS., Plaintiffs,
v.
"J. B. HAGGIN ET ALS., Defendants. } 214.

"In this cause, it appearing that by mistake and
"inadvertence Finding Number 11 of the Findings
"hereinbefore filed in this cause does not correctly set
"forth the facts intended to be found herein, and is
"consequently inconsistent with others of the findings
"herein; and whereas the said findings, except said
495 "Finding Number 11, do correctly set forth the facts
"intended to be found by the Court herein.
"Therefore, it is ordered that the said findings be
"amended and corrected as follows, to wit: that in lieu
"and stead of said Finding 11, as the same now ap-
"pears on file herein, the following finding be substi-
"tuted, to wit:

"11.

"That said New River diverges from Old River
"towards the right, but not northerly; after leaving
"Old River it runs southwesterly, and joins Buena

496 " Vista Slough at or about Section Five (5), in Town-
" ship Thirty-one (31) south, Range Twenty-five (25)
" east of Mount Diablo base and meridian, at the
" point known as Cole's Crossing, and so designated
" on the map hereto annexed, and flows thence to
" Buena Vista and Kern Lakes, and does not join
" Buena Vista Slough in or near Section Thirty (30),
" Township Thirty (30) south, Range Twenty-five (25)
" east of Mount Diablo base and meridian, except that
" in time of high water a portion of its waters do flow
" through a shallow channel (shown on the map to
" these findings annexed), and empty into said slough
497 " on or about said Section Thirty (30), and thence
" flow into Buena Vista and Kern Lakes.

"And it is further ordered that the Clerk of this
" Court do file this order in said cause, and do annex
" a duly certified copy of this order to said findings
" now on file herein; and it is further ordered that the
" said Clerk do forthwith serve or cause to be served
" a duly certified copy of this order on the respective
" attorneys of record of the plaintiffs and the defend-
" ants herein.

498 " Signed in open Court, this 19th day of November,
" A.D. 1881.

" B. BRUNDAGE,
" Superior Judge."

That said order was made without any notice to plaintiffs' attorneys, nor did they know anything about said order, or that such an order, or any order, was contemplated or to be made until they received a copy of such order by mail on the 20th day of November, 1881.

R. E. HOUGHTON.

499 Subscribed and sworn to before me, }
this 19th day of December, 1881. }
[SEAL] E. V. JOICE,
Notary Public.

Endorsed: Service of a copy of the within notice and affidavit hereby admitted, this 19th day of December, 1881.

LOUIS T. HAGGIN,
Attorney for the Kern River Land and Canal Company, Defendant.
Filed January 16, 1882.

500 ***Notice of Appeal.***

[Title of Court and Cause.]

You will please take notice that the plaintiffs in the above entitled action hereby appeal to the Supreme Court of this State, from the judgment therein rendered on the third day of November, 1881, and entered, in the said Superior Court, on the tenth day of December, 1881, in favor of the defendant, The Kern River Land and Canal Company in said action, and against said plaintiffs, and from the whole thereof.

Dated this 29th day of December, 1881.

501 STETSON & HOUGHTON,
Attorneys for Plaintiffs.

To the Clerk of said Superior Court and Louis T. Haggin, Esq., Attorney for defendant, The Kern River Land and Canal Company.

Service of a copy of the within notice of appeal is hereby admitted this 29th day of December, 1881.

LOUIS T. HAGGIN,
Attorney for Defendant, The Kern River Land and Canal Company.

Endorsed: Filed December 29, 1881.

502 A. T. LIGHTNER, Clerk.

Order Denying Motion to Strike from Files Order Amending Eleventh Finding.

(Title of Cause.)

February 7, 1882,

The motion to strike out the order amending the 11th finding, argued by respective counsel and denied by the Court. Plaintiffs except. Plaintiff read in sup-
503 port thereof the notice of motion and the affidavit of R. E. Houghton in support, both filed January 16, 1882, and also the order of the Court, endorsed order amending eleventh finding, which was referred to in said motion and set out at length and filed November 19, 1881.

504 ***Bill of Exceptions ~~and~~ Order Denying Motion to Strike out Order Amending Eleventh Finding.***

[Title of Court and Cause.]

Be it remembered, that on the 19th day of December, 1881, the plaintiffs, by Stetson & Houghton, their attorneys, gave notice of a motion for the 16th day of January, 1882, for an order striking from the files of the above entitled Court, the order made in the above entitled cause on the 19th day of November, 1881, that there be filed in place of the 11th finding of fact
505 theretofore filed in said case, a new and other finding of fact on the ground that the Court had no power to make such order, and on the further ground that said order was made without notice to plaintiffs.

The hearing on said motion was regularly continued from said 16th day of January, 1882, to this 7th day of February, 1882, when the said motion came up for hearing, R. E. Houghton appearing for the plaintiffs, and Louis T. Haggin, appearing for the defendant The Kern River Land and Canal Company.

In support of said motion said R. E. Houghton read
506 the said notice of motion and the affidavit of R. E. Houghton, both marked as filed herein on the 16th day of January, 1882, and also the order of the Court above referred to, filed November 19, 1881, and said papers are hereby made a part of this Bill of Exceptions.

That after reading said papers and argument had, the Court took said motion under advisement, and on the 7th day of February, 1882, denied said motion, to which ruling of the Court, said plaintiffs then and there duly excepted.

The foregoing Bill of Exceptions having been pre-
507 presented to me for settlement after due notice and within the time allowed by law. I hereby allow and settle the same, and certify the same to be correct.

Dated Bakersfield, February 7th, 1882.

B. BRUNDAGE,
Judge of the Superior Court of Kern County.

Endorsed: Filed February 7, 1882.

N. R. PACKARD, Deputy Clerk.

508 ***Order Denying Motion for a New Trial.***

Plaintiffs' motion for a new trial was denied by the Court, on the 7th day of August, 1882, by an order duly made and entered on that day.

Notice of Appeal.

[Title of Court and Cause.]

You will please take notice that the plaintiffs in the above entitled action hereby appeal to the Supreme
509 Court of this State from the order denying plaintiffs' motion for a new trial therein made and entered, in the said Superior Court, on the seventh day of August, 1882, and from the whole thereof.

Dated this 9th day of August, 1882.

Your, &c.,

STETSON & HOUGHTON,
Attorneys for Plaintiffs.

To the Clerk of said Superior Court, and Louis T. Haggin, Esq., Attorney for Defendant The Kern River Land and Canal Company.

510 Endorsed: Service of a copy of the within notice of appeal is hereby admitted this 11th day of August, 1882.

LOUIS T. HAGGIN,
Attorney for Defendant The Kern River Land and Canal Company.

Filed August 11, 1882.

512 ***Stipulation.***

[Title of Court and Cause.]

It is hereby stipulated and agreed by and between the counsel for plaintiffs and defendant in the above entitled case, that in making up the Transcript on Appeal herein, the Map annexed to the Findings and referred to on page 119 of this Volume, need not be inserted in said Transcript. But on the argument on the appeal herein, a correct lithograph copy of said map may be inserted in lieu of the original map; or in the event that such lithograph copy as may hereafter
513 be made shall not prove satisfactory to the parties hereto, then and in such event a traced copy of said original map, duly certified, or the original itself, shall be produced by plaintiffs, and may be used on said argument.

It is hereby further stipulated that the Transcript on Appeal in this case may be printed in five volumes, and filed in that form in the Supreme Court, and that the foregoing, which is the first volume, containing 128 pages, contains true and correct copies of original papers on file in the office of the Clerk of the Superior Court of Kern County, State of California,
514 constituting the Judgment Roll in this case, and of other papers and original orders entered in the minutes of said Court in said case. And that the other four volumes, containing respectively 596, 436, 420 and 266 pages, and each of said volumes having been signed by the attorneys of record in this case at the end of each volume, contain a true and correct copy of plaintiffs' Bill of Exceptions on Appeal, and also on motion for new trial in this case, and said five volumes shall constitute the Transcript of Appeal in this case, provided however, that nothing in this Stipulation contained, shall preclude the respondent upon suggestion of diminution of the record from bringing up before the Supreme Court any other papers in this case not in this transcript contained which the Supreme Court may hereafter deem necessary.

It is further stipulated that a sufficient undertaking
515 on appeal from the order denying plaintiffs' motion for a new trial, in due form of law, was on the 11th day of August, 1882, filed in said cause.

August 21st 1882.

Stetson & Houghton

Attorneys for Plaintiffs

Louis T. Haggin

Attorney for Defendants.

Service of this volume (1) accepted by copy this 21st day of August. A.D. 1882.

Louis T. Haggin

Attorney for Respondent.